IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 28, 2008 Session

STATE OF TENNESSEE v. H.R. HESTER

Direct Appeal from the Circuit Court for McMinn County
No. 00-115-117 Allen Wallace, Senior Judge

No. E2006-01904-CCA-R3-DD - Filed February 5, 2009

The McMinn County Grand Jury indicted the defendant, H.R. Hester, on one count each of premeditated first degree murder, attempted premeditated first degree murder, and aggravated arson. Following a jury trial, the defendant was convicted on all three counts. The jury found two aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death, see Tenn. Code Ann. § 39-13-203(i)(5); and (2) the victim of the murder was seventy years old or older, see Tenn. Code Ann. § 39-13-203(i)(14). The jury imposed the death sentence for the first degree murder conviction, and the trial court imposed sentences of twenty-five years and twenty years, respectively, for the attempted murder and aggravated arson convictions. All sentences were ordered to run consecutively to each other and to an earlier, two-year probationary sentence, for an effective sentence of death plus forty-seven years.

In this appeal as of right, the defendant challenges his convictions and sentences. He presents for this court's review twenty-nine issues that we generally restate as follows:

> I. The trial court's actions and rulings amounted to an egregious pattern of critical violations of the defendant's constitutional right to due process;
> II. The defendant was deprived of his constitutional right to a jury panel composed of a fair cross-section of the community;
> III. The defendant was deprived of his constitutional right to a fair trial by the defective and illegal methods employed in selecting the venire panel;
> IV. The defendant was deprived of his constitutional right to a fair trial by the court's refusal to allow the defense to hire a state-funded expert on venire selection;
> V. The defendant's constitutional rights were violated by the trial court's exclusion of certain jurors from the panel;
> VI. The defendant was wrongfully deprived of his right to self-representation;
> VII. The defendant was entitled to a continuance when new counsel was appointed one week before trial;
> VIII. The evidence was insufficient to sustain the defendant's conviction for premeditated first degree murder;
> IX. The trial court committed reversible error in demonstrating bias before the jury by commenting on and questioning the jurors regarding certain evidence;

X. The trial court erred in permitting the State to recall Agent Brakebill to testify that the defendant's blood test was taken some twelve hours earlier than the time written by the hospital nurse and provided to the defense during discovery;
XI. The jury instructions regarding reasonable doubt violated the defendant's constitutional rights;
XII. The trial court committed reversible error in denying the defendant the right to present vital mitigating evidence during the capital sentencing phase of the trial;
XIII. The trial court erred in admitting victim impact testimony at the sentencing phase of the trial;
XIV. The trial court erred in replacing one of the twelve jurors who convicted the defendant in the guilt phase when the juror reported feeling ill during the sentencing phase of the trial;
XV. The trial court erred in denying the defendant the right to allocute before the jury during the sentencing phase of the trial;
XVI. The defendant was denied compulsory process in violation of the Sixth Amendment to the United States Constitution;
XVII. The circumstances surrounding the defendant's waiver of rights in the sentencing hearing violated the defendant's constitutional rights;
XVIII. The trial court erred in enhancing the defendant's sentences in the non-capital cases where none of the enhancement factors were submitted to and found by a jury in violation of Cunningham v. California , 549 U.S. 270, 127 S. Ct. 856 (2007) and State v. Gomez, 239 S.W.3d 733 (Tenn. 2007) ("Gomez II"). The trial court further erred in failing to credit the mitigating factors offered in the non-capital cases;
XIX. The trial court erred in denying the defendant a hearing on his motion for new trial;
XX. Requiring the jury to unanimously agree to a life verdict violates Mills v. Maryland, 485 U.S. 367, 108 S. Ct. 1860, and McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227;
XXI. Tennessee Rule of Criminal Procedure 12.3(B) violates the defendant's due process rights and the principles announced in Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546 (2006), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348;
XXII. The State should have been prohibited from seeking the death penalty when the State waited twenty-two months after indictment before declaring its intent to seek the death penalty and there was no change in circumstances which would justify such action;
XXIII. The death penalty was imposed in a discriminatory manner;
XXIV. The cumulative effect of all errors at trial violated the defendant's right to due process;
XXV. The failure to articulate or apply meaningful standards for the mandatory proportionality review violates the defendant's due process rights;
XXVI. Lethal injection is cruel and unusual punishment;
XXVII. The death sentence is unconstitutional because it infringes upon the defendant's fundamental right to life and is unnecessary to promote any compelling state interest;

XXVIII. The defendant's convictions and death sentence violate international law and the supremacy clause of the United States Constitution; and
XXIX. This court should reject the defendant's sentence of death and remand for resentencing in consideration of the Governor's moratorium on the death penalty, the increasing evidence of the arbitrariness of the death penalty on a national basis, and the constitutional, statutory, and human rights issues presented herein.

Upon review, we affirm the defendant's convictions but reduce the defendant's sentence for attempted first degree murder to twenty years pursuant to Gomez II. In all other respects, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed in Part, Reversed in Part; Case Remanded.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Rich Heinsman and Lee Davis, Chattanooga, Tennessee, for the appellant, H.R. Hester.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; R. Steven Bebb (on appeal) and Jerry N. Estes (at trial), District Attorneys General; and William W. Reedy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Guilt Phase Proof

Dora Mae Hester testified that she and the defendant were married in April 1992 and divorced six months later following a "violent incident." She said the defendant "came and went" in the ensuing years.

According to Ms. Hester, in 1996 she met Charles Mitchell Haney, the deceased victim in this case, through a mutual friend. Ms. Hester became friends with Mr. Haney and began cooking and cleaning for him because he was elderly and had health problems. At the time, Mr. Haney was about seventy-five years old and unmarried, but had been twice widowed. He had no children but had elderly siblings. Eventually, Mr. Haney requested that Ms. Hester care for him so that he would not have to live in a nursing home. Ms. Hester and Mr. Haney made an arrangement whereby Mr. Haney purchased a mobile home in which they would live. The mobile home was placed on a lot owned by Ms. Hester. Mr. Haney also purchased a car for Ms. Hester to use in driving him to doctor's appointments and for other errands. According to Ms. Hester, she and Mr. Haney combined their incomes, and she wrote checks for Mr. Haney's expenses as needed. The defendant initially lived in a camper that Ms. Hester formerly occupied that was parked on the same lot. After the camper caught fire, the defendant first moved to an apartment, but he later moved into the mobile home with Ms. Hester and Mr. Haney.

About six months after moving into the mobile home, Mr. Haney fell and injured his knee. As a result of his injury, he moved into a nursing home to undergo physical therapy. Eight months later, Mr. Haney returned to live in the mobile home with Ms. Hester. On his return, Mr. Haney required a walker to move around. Ms. Hester said that in December 1999, Mr. Haney lived in a bedroom at one end of the mobile home, and she and the defendant shared the second bedroom at the opposite end. The defendant did not work steadily but took odd jobs performing plumbing and electrical work. Ms. Hester said the defendant drank alcohol, "sometimes slightly, and then sometimes heavy . . . just according to . . . his moods . . . . "

Ms. Hester recalled the morning of December 14, 1999. She testified that the defendant's mother came over and that he changed the oil in her car. The defendant left with his mother and returned with a 12-pack of beer that he began drinking. He stopped drinking and did some work for a neighbor. Ms. Hester said that when the defendant returned at around 1:00 p.m., she asked him to look after Mr. Haney while she drove her daughter to the store. Ms. Hester testified that she was gone "a pretty good while" and returned to find the defendant drinking again. Later in the day, Ms. Hester tried to get the defendant to lie down and relax because he had "started drinking quite a bit." Ms. Hester said her daughter called, and she left to take her to the store a second time at about 5:30 that evening. Ms. Hester said she returned with cigarettes and dinner for everyone. She served Mr. Haney, but the defendant told her he was not hungry. Ms. Hester said that the defendant left the mobile home, then returned and began knocking on all the doors until she let him back inside. He asked her to lend him ten dollars to buy more beer, but she refused, telling the defendant he had drunk enough that day.

Ms. Hester testified that she went to Mr. Haney's room and told him that she thought the defendant was mad at her because she had refused to lend him money to buy more beer. Then the defendant entered Mr. Haney's bedroom armed with a knife. According to Ms. Hester, the defendant was "very hostile" as he ordered her and Mr. Haney to the front of the mobile home. The defendant ordered Mr. Haney to sit in a recliner and Ms. Hester to sit on a love seat as he walked through the trailer complaining. He threatened Mr. Haney with the knife to his throat. Ms. Hester said she tried to run out the door and yell for her daughter, but the defendant pulled her back inside and placed the knife to her throat. The defendant retrieved some duct tape, ordered Mr. Haney to lie on his stomach, taped his hands, ankles, and mouth, and instructed Mr. Haney to turn over on his back. Ms. Hester said that the defendant bound her the same way, all the while repeatedly telling them that they were "all three going to die that night" and the defendant would "tell the law" what he had done. The defendant sat at the dining table for about five minutes, smoked a cigarette, and continued mumbling. The defendant went outside and returned with a jug of kerosene that he poured throughout the mobile home. He unplugged the fire alarms then threw Ms. Hester's pet dog outside, saying, "You little bastard. You hadn't done anything." Ms. Hester said that although her mouth was bound, she told Mr. Haney that she loved and appreciated him for being so good to her and began to pray.

The defendant attempted to light a fire, first with matches, then with a cigarette. When this did not work, he lit a twisted newspaper, placed it next to the stove, and left with the trailer on fire. Ms. Hester said that white smoke filled the air as she tried to scoot toward the front door, still bound

with duct tape, and she realized her legs were on fire. She recalled that the defendant had shut the screen door and slammed the front door as he left. She reached the door but could not open it. The next thing she remembered was lying on the steps outside the trailer and hearing her daughter calling her name and touching her. Someone pulled the tape off her mouth, and Ms. Hester said, "H.R. done this to me." She recalled her daughter telling her to "roll" because she was on fire, but she could not because her hands were still taped. Ms. Hester recalled a neighbor helping to tear off her jeans and taking her to her daughter's trailer until an ambulance arrived. She said that she came in and out of consciousness as she was transported to the county fairgrounds to be airlifted to the Erlanger Hospital Burn Unit.

In further testimony, Ms. Hester recalled that as the defendant poured the kerosene throughout the trailer, "sloshing [it] back and forth," some of the fuel got on her and some on Mr. Haney. Ms. Hester identified the knife that the defendant had threatened them with before the fire and a photograph of the scar left by the defendant's knife when he threatened to cut her throat. Ms. Hester described her injuries to the jury. As a result of the fire, both of her legs were amputated and she had undergone skin grafts on her arms and entire back. She had severe scars and suffered nerve damage. At the time of the trial, she had artificial legs and was trying to learn to walk unassisted.

On cross examination, Ms. Hester testified that in December 1999, she and the defendant had been living together in the trailer and sharing a bedroom for about four months. Ms. Hester said she treated Mr. Haney as she would her own father. She said their friendship grew, but their relationship was never romantic. She testified that on the evening of the fire, Mr. Haney had asked her about marrying him in order that his social security and veteran's benefits would go to her after he passed away. Ms. Hester said that the discussion was about a "marriage of convenience," not a "lust/love" arrangement. She said that Mr. Haney wanted to reward her for taking good care of him and had nothing other than his benefits to leave her. Ms. Hester was aware that Mr. Haney had discussed the possibility of marrying Ms. Hester with the defendant, and she knew the idea did not please him because the defendant had always considered Ms. Hester to be his wife even though they were divorced. Ms. Hester said that the only reason she had taken the defendant into her home was out of pity because he had no job and no other place to live. She said that although they shared a bed, there was little sexual intimacy because the defendant was an alcoholic. Ms. Hester did not believe that the discussion about marrying Mr. Haney had angered the defendant and motivated him to set the fire. She said that the defendant had always been "jealous" of her and felt that he was "just mean." She said the defendant always commented that she needed a younger man and that he was "just too jealous."

According to Ms. Hester, the defendant contributed very little financially to the household expenses and spent the money he did earn on beer. She said that she and the defendant did not argue on the morning of the fire, but he became very "agitated" with her when she refused to lend him beer money that afternoon. She agreed that the defendant was "in a very disturbed and confused state of mind" when he set the fire. She described his appearance and demeanor in the evening hours of December 14: "He was very highly intoxicated and just real out of it, to me, because he was so highly intoxicated the (sic) he was just mumbling. He couldn't, you know, just out of it, in other words, intoxicated." Ms. Hester said although the defendant was intoxicated, she believed that he still knew what he was doing. She said he took many steps before setting the fire and described his

actions as methodical, "just like pattern work."

Tim Lynn was married to Ms. Hester's daughter, Kathy, and lived in another trailer located on the same property as Ms. Hester and Mr. Haney. Lynn said he was at a nearby garage talking with the owner, Curtis, on December 14 at about 5:30 p.m. when the defendant entered. The defendant reached in his coat pocket, pulled out a half-full quart bottle of beer, and began drinking. The defendant asked to borrow a chainsaw and also asked whether Lynn or Curtis could help him haul some wood. The defendant asked Curtis and then Lynn if they could give him $10.00, but both men declined. The defendant asked Lynn to drive him home and finished the bottle of beer as he got into Lynn's truck.

Lynn said as they rode home, "[s]omething came up about that we both should get rid of our wives so we don't have to hear them bitch no more." Asked about the defendant's exact words, Lynn said the defendant said, "[W]e should kill them, you know, get rid of them so we don't have to hear their bitching no more." Lynn said he had heard the defendant make similar statements before about getting rid of, but not killing, their wives and did not believe the defendant was serious. Lynn said the defendant's speech was normal, and the defendant did not seem unstable as he exited the truck and walked toward Ms. Hester's trailer. Lynn said he went back to Curtis' garage to do some repair work at about 6:45 p.m. About twenty minutes later, Lynn's wife came to the garage and was crying hysterically, telling him to call 911 for help. They reported a trailer fire and drove back home. Lynn found Ms. Hester's trailer on fire. He and a neighbor, Allen Stevens, tried to enter as the front door was melting. The men saw Mr. Haney's body in the living room, and as Lynn tried to enter, something flew up and burned his face. He and Stevens concluded that Mr. Haney was already dead. Lynn returned to his home and found Ms. Hester standing in the living room wearing only panties and a t-shirt. There was smoke coming from her body, her pants had burned away and there was duct tape on her ankles. She was shaking and had a shocked expression on her face. Lynn said Ms. Hester kept repeating that "H.R. done this to me. H.R. done it to me." He said she sat down and began crying as the fire department and paramedics arrived.

Lynn said when he and his wife went through Ms. Hester's trailer to see what could be saved, his wife found a blue and white cooler with six cans of beer in it underneath a cabinet in the kitchen. He observed that the two smoke detectors in the trailer had been unhooked. On cross-examination, Lynn said he did not observe the defendant drinking on December 14 except for the quart bottle of beer he had at the garage. He said the defendant appeared to be "a little intoxicated" at that time. He acknowledged describing the defendant as being "very drunk" in a statement to police on the night of the fire.

Betty Fain, sister of Charles Haney, testified that her brother had served in World War II and had worked for Boeing Aircraft before returning to live in Tennessee. After operating a newsstand for about fifteen years, Mr. Haney retired in 1980 at age 58 because of medical disabilities. Mr. Haney was the second oldest of ten children. Fain said Mr. Haney's siblings convinced him to move back to McMinn County after his second wife passed away so that they could help care for him.

Terry Wilson, a canine handler for the McMinn County Sheriff's Department, was dispatched to Ms. Hester's trailer on December 14, 1999, to search for the defendant, the suspect in the fire.

Wilson learned the defendant had been taken into custody and was being transported to the Athens Hospital emergency room for treatment. Wilson then went to the hospital; when he arrived there, he went into the treatment room with the defendant and Tennessee Bureau of Investigation (TBI) Special Agent Barry Brakebill. He searched the defendant and found a knife in his front pants pocket. Wilson said the defendant did not say much and appeared to have some burns to his hands and upper arms. He observed that the defendant smelled strongly of petroleum.

Agent Brakebill testified that he reported to Ms. Hester's trailer on December 14 and generally assessed the crime scene. He said the bomb and arson squad was there because a fire-related death had been reported. He went inside the front of the trailer, took photographs of the victim, Mr. Haney, and conducted some interviews. He went to the home of a neighbor a few miles away where it was suspected that the defendant had gone, but Agent Brakebill learned that the defendant had already been arrested at that location and taken to the hospital. At the hospital, Agent Brakebill observed that the defendant had second-degree, blistered burns on his hands and burns on his left arm. He also noticed a strong kerosene odor. Agent Brakebill obtained the defendant's clothing and personal items including a billfold, license, a small knife, and a lighter, and sealed them in new paint cans as evidence.

On further examination, Agent Brakebill testified to his understanding that after arriving at Mr. Cooley's home, the defendant had asked Mr. Cooley to call the police, and the defendant was arrested without incident. Agent Brakebill said that he witnessed blood being drawn from the defendant at the hospital on the evening of December 14. He turned the blood sample over to the state fire marshal's office for analysis and understood from other sources that the test was "negative."

TBI Agent William Barker testified that he received the defendant's blood sample from Agent Brakebill and transported it to the laboratory for analysis. Agent Barker said that his request for testing indicated that the sample he received was taken from the defendant at 12:45 p.m. on December 15 by a "Robin Smith, R.N." He was not present when the sample was drawn and had no knowledge whether another blood sample was taken from the defendant.

Agent Brakebill was recalled and testified that he was personally present when the nurse drew the defendant's blood sample. He said the alcohol toxicology request form was filled out partially by himself and partially by the nurse. He said that he recalled that the sample was drawn in the night hours of December 14 or early morning hours of December 15, while he was at the emergency room with the defendant. He said if the form reflected that the sample was drawn at 12:45 p.m. on December 15, it was incorrect.

Dr. Ron Toolsie testified as an expert pathologist. He examined the body of Charles Haney and determined that he died from a combination of smoke inhalation and burns. Dr. Toolsie found "undoubtedly" that Mr. Haney was still alive when the fire started based on smoke deposits in his airways that resulted from breathing in the smoke. Based on the lack of a significant level of carbon monoxide in his blood, Dr. Toolsie determined that "Mr. Haney died predominantly of thermal burns and did not survive long enough to inhale sufficient amounts of smoke . . . . " Dr. Toolsie opined that the victim inhaled a few breaths of "super heated" air that caused respiratory arrest, followed

by a loss of consciousness within about a minute.

At this point on the second day of trial, the State rested its case. The defendant did not testify and presented no proof. After deliberating less than two hours, the jury returned its verdict finding the defendant guilty on all counts as charged.

Sentencing Phase

State's Proof

Agent Brakebill testified that on the date of the fire, he interviewed a nearby neighbor of the victims, Mr. Jeffrey Coleman, who reported that he came out of his trailer and saw Ms. Hester lying on the ground on fire and tried to assist her. Agent Brakebill said Coleman suffered substantial burns to his hands in the process. Agent Brakebill identified Exhibit 27, the death certificate of Charles Haney, reflecting that Mr. Haney was seventy-seven years old at the time of his death.

Agent Barker further testified regarding the trailer fire. As the fire grew, the oxygen in the trailer was depleted. If enough combustion built up, someone who opened the door could very likely have experienced a "back-draft-type explosion." He said that it appeared that the fire, at its highest point, "was at the edge of a flash-over," meaning that everything in the kitchen and living area was about to burn. Opening a door under these conditions could have resulted in a powerful blast or a "blow torch effect," whereby smoke rolls out and ignites as soon as it hits the outside air. Agent Barker said that this effect would be consistent with burns to a person's face, particularly the forehead. He said that the fire posed a danger and risk to anyone who came into contact with it, particularly untrained civilians attempting to perform a rescue. Regarding Mr. Haney, Agent Barker had observed that duct tape had been wrapped all the way around his head and he was facing head up with his hands taped behind his back.

On further examination, Agent Barker estimated that it took about five minutes for the fire to reach its highest point. He explained that a lay person such as the defendant would probably not know that a smaller amount of accelerant can actually cause more damage. He did not know of anyone other than Ms. Hester and Ms. Haney that suffered a life-threatening injury as the result of the fire.

Dr. Toolsie testified regarding Mr. Haney's injuries. In his report, he noted "severe third and fourth degree burns to the entire body with relative preservation of back, groin, and distal upper extremities." He explained this was caused by the victim being placed on his back with his hands criss-crossed and tied together behind him. There were burns to the victim's face and flexing of his hips and knees caused by the muscles being burned away. Some of the burns were "undoubtedly" sustained before he died, while others occurred after death. Unusual patterns of circular blisters on the face, "very typical of direct super heated contact," left him "fairly suspicious that there was a direct fire that started on the face area, possibly if not probably due to the direct application of an accelerant." Dr. Toolsie said that the use of an accelerant "may have minimized the time of suffering, but the degree was probably not minimized." Mild to moderate coronary artery disease was a "very minor" contributor to Mr. Haney's death in that the need for maximum blood flow

increased during a time of high physiological stress such as a fire. To conclude its proof, the State read into evidence victim impact statements from Mr. Haney's siblings.

Defendant's Proof

Robert Jackson Thomas, Jr., a minister, was well acquainted with the defendant's parents. He had limited personal knowledge of the defendant prior to the crimes but had visited him on numerous occasions in jail. Reverend Thomas said that he was "remarkably . . . impressed" with the defendant's spiritual growth since he went to jail. He said the defendant discussed some "deep theological" things with him that someone with only a "surface religion" would not have discovered. He arranged for the defendant to be baptized in jail because the defendant felt it would be "the right thing to do."

On cross-examination, Reverend Thomas said that he had no knowledge of the defendant's confessing to the victim's murder. The defendant had told him that he did not remember anything about the fire. Reverend Thomas acknowledged a prior statement in which he stated that the defendant may have avoided hypnotism to refresh his memory about the fire and might be intelligent enough to manipulate the situation. Reverend Thomas said the defendant was always nice to him, even when he was drunk. He said the defendant had the reputation of being "one of the best plumbers or electricians" around.

Ronald Dean Elder testified that he was an electrician and had known the defendant for about twenty-five years. He said they both began in the plumbing business and had worked side-by-side. The defendant did his job well and often helped people "on the side" without charge. Elder knew the defendant drank beer in the evenings after work but said the defendant always showed up on time for work the next day. He never knew the defendant to be violent or threatening. On cross-examination, Elder said the defendant could read and write well enough to read blueprints. He knew of the defendant having seizures but had not personally observed this. Elder said the defendant could be "mouthy" when he drank and agreed that the defendant was strong-minded and independent.

Jerelene Hester Daugherty, the defendant's mother, testified that the defendant's father, "Troy Sr.," had a drinking problem and drank every day after work and all day on weekends. He was abusive when he drank and often beat her, the defendant, and the defendant's four siblings "real bad, for no reason." He did the grocery shopping himself and provided only beans, potatoes, and cornbread for the family to eat. Ms. Daugherty said she was not allowed to shop because her husband was very jealous and feared she would meet someone or a man might speak to her. She said the family moved seventeen times in as many years.

Ms. Daugherty said the defendant was abused more than the other children because he was the oldest and often tried to stand up and protect her. She said the defendant suffered beatings and whippings nearly every weekend from about age eight until his father "ran him off from home and told him not to come back" when he was about twelve years old. She said the defendant's father played "Russian roulette" by aiming his gun at the defendant and her. She said she left Troy Sr. after he chased the defendant away from home, and the defendant then returned to live with her. Ms.

Daugherty said that her daughter told her that Troy Sr. had sexually abused her and that the defendant was aware of the abuse. She did not know whether the defendant had also been sexually abused. She said the defendant's use of alcohol began "real young," when his father gave him sips of beer even before the defendant began walking. She said the defendant was frequently intoxicated, inhaled gasoline, and had been hospitalized for substance abuse. Daugherty did not believe the defendant committed the crimes. She said she loved him and did not want him to get the death penalty.

On cross-examination, Ms. Daugherty testified that she married and divorced Troy Sr. twice. She said Troy Sr. fixed sewing machines for a living and was never out of work; he always found a new job before he quit the old one. She said that he worked as a corrections officer in Texas before he died and that the defendant had gone to live with him in Texas for a while. Daugherty was aware of the defendant's problem with alcohol, but she bought the defendant a six-pack of beer on the day of the fire.

Based on its finding of two aggravating circumstances, that the victim was over seventy years of age and that the murder was especially heinous, atrocious, or cruel, and upon its finding that these factors outweighed any mitigating evidence, the jury sentenced the defendant to death for the murder of Charles Haney.

ANALYSIS

I. & XVI. Compulsory Process

The defendant essentially contends that he was denied compulsory process throughout the trial court proceedings, "the denial of which ripples through this case and infuses error into the entire proceeding." He seeks a new trial with the enhanced due process he asserts is required in the litigation of a capital case. Although the defendant challenges "most" of the trial court's rulings on the "hundreds" of pre-trial motions he filed, the gist of his argument is as follows:

> By quashing nearly every subpoena issued by the defense to substantiate it's (sic) motions, and then denying every procedural motion and claim with little or no opportunity for argument or record-making, the court sidestepped the immortal, got the trial and the conviction, shifted the burdens, passed the buck, and lived to fight another day.

The State submits that the defendant has presented on appeal a litany of complaints without offering any citation to relevant supporting authority. The State addresses only the defendant's claim that the trial judge should have recused himself based on his inability to preside over the defendant's case with impartiality. To this alleged error, the State responds that the record does not reflect that the defendant ever moved the trial judge to recuse himself or that there was any basis for the judge's recusal.

In support of his claims, defense counsel points only to a letter counsel provided to the court summarizing the status of various motions in advance of motions hearings on September 9 and 10,

2003. The letter lists sixty-six motions and the related witnesses for whom the defense issued subpoenas. The defendant states that with the exception of five witnesses subpoenaed to testify regarding jury selection matters, all other subpoenas were quashed. The defendant asserts that the trial court erred in denying each motion on its merits and also in quashing the related evidentiary subpoenas. He does not further elaborate on the challenged rulings except to advise this court on its consideration of his due process claim. In this regard, counsel states: "It is important to read this [letter] with care, and to read the underlying motions, many of which were extensively briefed; with no witnesses to call once the subpoenas were quashed, the record contains very little evidence upon which to allege error."

In the next thirty pages of his brief, the defendant sets forth myriad rulings, events, and actions in his case that he contends together establish a lack of due process in the trial court proceedings at every turn. He asserts the denial of a preliminary hearing, denial of a pre-trial bond hearing, denials of discovery requests and evidence admission, denial of hearings, denial of his requests to address the court and request to proceed pro se, changes of counsel, changes of the trial judge, errors by the court, errors by the trial clerk, slow justice, a late death penalty notice, prosecutorial abuse, bias of the trial court, an obstinate court reporter, denial of ex parte hearings, denial of funding, improper commentary from the bench directed at defense counsel, and other matters. Counsel sets forth his disagreement with these and other aspects of his case with no citation to supporting authority, sporadic references to the record, and many conclusory allegations of error. Counsel states that lingering in each of these assignments of error "is the underlying inability to make a record for appeal because of the subpoenas that were quashed and the motions that were summarily denied." In this regard, the only citations to authority are to cases recognizing and elaborating on the constitutional right to compulsory process in general.

This court has examined compulsory process in criminal proceedings as follows:

> The Sixth Amendment to the United States Constitution grants an accused a right to compulsory process for obtaining witnesses in his or her favor. Faretta v. California, 422 U.S. 806, 816, 95 S.Ct. 2525, 2532 (1975). However, a criminal defendant's right to compulsory process is not absolute; rather, the United States Constitution only prohibits a state from denying a defendant the ability to present testimony that is "'relevant and material, and . . . vital to the defense.'" United States v. Valenzuela Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446 (1982) (quoting Washington, 388 U.S. at 16, 87 S.Ct. at 1922)) [. . .] The Tennessee Constitution similarly affords a defendant facing criminal prosecution the right "to have compulsory process for obtaining witnesses in [the defendant's] favor." Tenn. Const. art. I, § 9. Moreover, like the United States Constitution, our state constitution only extends to a defendant a right to compulsory process "[i]f a prospective witness is or probably will be a material one. . . . The matter turns on whether the issuance of process would in fact be an abuse of process, and, if the Court finds such is the case the Court has power to prevent such abuse." Bacon v. State, 385 S.W.2d 107, 109 (Tenn.1964); see also State v. Smith, 639 S.W.2d 677, 680 (Tenn. Crim. App. 1982) ("'[T]he constitutional right to compulsory process requires such process for, and only for, competent,

> material, and resident witnesses whose expected testimony will be admissible.'"); see also T.C.A. § 40-17-105 ("As provided by the Constitution of Tennessee, the accused, in all criminal prosecution has a right to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in the accused's favor.")
>
> . . . .
>
> In reviewing a trial court's exercise of its power and duty to prevent the abuse of its process, appellate courts in Tennessee have generally applied an abuse of discretion standard. See, e.g., State v. Burrus, 693 S.W.2d 926, 929 (Tenn. Crim. App. 1985).

State v. Frank Lee Tate, No. W2004-01041-CCA-R3-CD, 2007 WL 570555, at **12-13 (Tenn. Crim. App. Feb. 23, 2007) (some internal citations omitted), perm. app. denied (Tenn. June 18, 2007).

In this case, although the defendant makes numerous generalized allegations regarding what he perceives to be the trial court's systematic denial of compulsory process, he makes no specific arguments regarding these supposed abuses. Regarding the subpoenas addressed at the September 2003 motions hearing, the defendant has not adequately indicated what the proposed testimony of any of the excluded witnesses would have been, nor has he specifically argued how the exclusion of this testimony prejudiced him. Furthermore, our review of the transcript from the motions hearing indicates that the trial court allowed the defendant ample opportunity to argue in support of the motions he presented (and in support of the subpoenas he filed in connection with those motions), and that the trial court's quashing subpoenas and denying motions were not arbitrary or capricious, as the defendant suggests. In short, the defendant has not established that the trial court's denying his motions and quashing his subpoenas constituted an abuse of discretion that denied him compulsory process. The defendant is therefore denied relief on this issue.

II. Fair Cross-Section Requirement

The defendant asserts that he was denied his constitutional right to a fair and impartial jury drawn from a fair cross-section of the community. In particular, he claims that the existing jury venire, drawn from a list of registered drivers supplied by the Tennessee Department of Safety, was "unconstitutionally distorted by age and race" so that the youngest, eldest, and minority members of the county were systematically excluded.

Under the Sixth and Fourteenth Amendments to the Constitution, juries must be drawn from a source that is "fairly representative of the community" in which the defendant is tried. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 703 (1975). In Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979), the United States Supreme Court set forth the test for determining whether a jury is properly selected from a fair cross-section of the community. In order to establish a prima facie violation of the fair cross-section requirement, a defendant must show:

(1) that the group alleged to be excluded is a "distinctive" group in the community;

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 363, 99 S. Ct. at 668. This test has been long applied to cases in this state. See State v. Mann, 959 S.W.2d 503, 535 (Tenn. 1997); Adkins v. State, 911 S.W.2d 334, 353 (Tenn. Crim. App.); State v. Blunt, 708 S.W.2d 415, 417 (Tenn. Crim. App. 1985); State v. Nelson, 603 S.W.2d 158, 161 (Tenn. Crim. App. 1980).

First, the defendant asserts that both African Americans and Hispanics were impermissibly underrepresented in the venire. The United States Supreme Court has recognized African Americans as a distinctive group in the community. See Alexander v. Louisiana, 405 U.S. 625, 628, 92 S. Ct. 1221, 1224 (1972). Hispanics have also been held to constitute a cognizable group in the community. See Hernandez v. Texas, 347 U.S. 475, 478, 74 S. Ct. 667, 670 (1954). Regarding young persons and the elderly, the defendant concedes that he has found no authority identifying these groups as distinct for purposes of the fair cross-section analysis. To the contrary, this court has determined that "persons within a specific age group do not constitute a distinct identifiable class in the general population." State v. Boyd, 867 S.W.2d 330, 336 (Tenn. Crim. App. 1992) (quoting Teague v. State, 529 S.W.2d 734, 739 (Tenn.Crim.App.1975)); see also Blunt, 708 S.W.2d at 417 (rejecting claimed violation of fair cross-section requirement upon the court's conclusion that it was "not prepared to say that the age of 65 should mark the boundary for a cognizable element of society."). We observed in Boyd, for example, that "people over the age of seventy-five have a myriad of attitudes, ideas, and experiences and should not be considered as a cognizable group." Boyd, 867 S.W.2d at 336. Our analysis and the viability of the defendant's asserted violation thus end with respect to the exclusion of potential jurors based on age.

Having determined that African Americans and Hispanics are distinctive groups in the community, we next consider the representation of these identified minority groups in the venire in relation to the number of such persons in the community. According to the 2000 U.S. Census Bureau Data of record, the makeup of McMinn County was 92.7% white, 4.5% black, and 1.8% Hispanic. The venire from which the defendant's jury was selected in December 2003 was 96.0% white, 3.4% black, and 0% Hispanic. Stated differently, of the 175 prospective jurors, six were black, none were Hispanic, one was "other," and the rest were white. In our view, the slight disparity between the numbers of prospective African American and Hispanic jurors in the venire in relation to their numbers in the community is statistically and legally insignificant, varying from just over one percent with respect to African Americans and just under two percent with respect to Hispanics. As this court has observed, "[n]either the jury roll nor the venire panel need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group in the community." Blunt, 708 S.W.2d at 417 (citing Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965); State v. Jefferson, 529 S.W.2d 674 (Tenn. 1975)).

On the record presented, we conclude that the defendant has failed to establish the second prong of the applicable test under Duren by showing that either African Americans or Hispanics

were not fairly or reasonably represented in relation to their number in the community. It follows that the defendant has failed to establish his claim and is not entitled to relief as to this issue.

III. Juror Selection Process

In a related issue, the defendant submits that McMinn County utilizes a system of electronic selection to select jury venire panels that fails to ensure the required "proportionate distribution of names," or randomness, required in the juror selection process. Secondly, he asserts that the failure of the McMinn County process to comply with applicable statutory provisions for selection of juror lists requires that his indictment be quashed and a new petit jury empaneled. The defendant further asserts that of three McMinn County Jury Commissioners, one lacked the mental capacity to perform her duties and another was statutorily disqualified from service, thus leaving the commission without authority to act.

First, the defendant challenges the selection of the jury venire in McMinn County by electronic means based on a database of registered drivers provided by the Tennessee Department of Safety. The court heard testimony about the jury selection method utilized in McMinn County at a pre-trial hearing in September 2003. Todd Kellogg with the Tennessee Department of Safety testified that his department provided data for numerous counties in Tennessee to use in jury selection. Mr. Kellogg testified that his department provided to the county a list of all drivers with a valid driver's license within the county. He said that generally, a younger person would have a higher license number than an older person, but this was not always the case because licenses are assigned in order, to new drivers and new residents to the county alike. Lisa Esquinanze, Local Government Data Processing Corporation, testified that her company was a private corporation that took the data supplied from the Department of Safety, converted it into a tape, and provided it in software form to counties to use in selecting juror pools. She stated that most often, the court clerk would select a beginning number and decide the increment to be applied to develop a list of prospective jurors. She said this was the same process formerly used by jury commissions. Pat Newman, Deputy Clerk for McMinn County, testified to the juror selection process at the time of the defendant's trial. She said of the 35,000 names provided, the county selected 700 names by beginning with the two thousandth licensee and selecting every forty-seventh name thereafter on the list provided by Data Processing. Ms. Newman said that of the 700 names selected in this manner, about 200 were removed by the jury commission leaving about 500 persons who were summoned. She said that the summoned jurors were a group from which sixteen to eighteen jury panels could be selected.

The defendant complains that the described system of selecting potential jurors in McMinn County resulted in the systematic exclusion of young, old, and minority persons because the drivers license database was not arranged alphabetically before names were selected. He concludes that by excluding the first 2000 names provided, those with the lowest license numbers, the eldest persons in the community were excluded. He further concludes that the low increment applied to choose names resulted in the last 7000 names, or those having the highest license numbers, being excluded. The defendant asserts that these names represented the youngest persons in the community. Analyzing this data, the defendant concludes that "the newest licensees are young, and they are minority" and "the selection mechanism skips the oldest and least Caucasian part of the population."

As both parties acknowledge, our supreme court considered a similar challenge to the use of drivers license rolls in selecting the jury venire in State v. Mann, 959 S.W.2d 503, 535 (Tenn. 1997). In rejecting Mann's argument that the selection methods employed in that case denied African Americans the opportunity for jury service, the court observed:

> T.J. Jones, the Circuit Court Clerk for Dyer County, outlined to the trial court the method by which his office selects the jury venire in Dyer County. He testified that his office selects the jury venire from a list of licensed drivers in the county. Out of the total county population of 38,000 people, there are 28,000 licensed drivers. Members of Jones' office calculate the number of jurors required for a two year period, which in this case was approximately 3,000. They then divide the number of licensed drivers by the number of jurors needed. The quotient determines the number of names they will skip when they count down the alphabetical list of 28,000 licensed drivers to obtain 3,000 jurors. Mr. Jones further testified that, of the 150 jurors available for the selection of the appellant's jury, twelve or thirteen were African-Americans. Consequently, African-Americans constituted approximately eight percent of the prospective jurors. Finally, Jones testified that approximately seven percent of the population of Dyer County is African-American.
>
> Accordingly, the record reveals no disparity between the size of the cognizable group in the community and its representation in the appellant's jury venire. Nor does the record contain evidence that the use of driver's license rolls has resulted in the systematic exclusion of African-Americans in the jury selection process. Indeed, our supreme court has approved the use of voter registration lists to select potential jurors. See State Caruthers, 676 S.W.2d 935, 939 (Tenn. 1984), cert. denied, 469 U.S. 1197, 105 S. Ct. 981, 83 L. Ed. 2d 982 (1985). Although no court in this state has addressed the use of driver's license rolls in selecting jury venires, we can see no material difference between the use of a list of registered voters and the use of a list of registered drivers. The appellant has failed to establish a prima facie case under either the state or federal constitution. Having completely reviewed the record, we do not find any error in the selection of the jury in this case.

Mann, 959 S.W.2d at 535-36.

The record reflects that McMinn County utilizes an electronic method of juror selection that is similarly based on driver's license rolls supplied by the Tennessee Department of Safety. At the time of the defendant's trial,[1] this method of selection was authorized pursuant to Tennessee Code Annotated section 22-2-304(e), which provides that a county may opt in to jury selection by mechanical or electronic means "in such a manner as to assure proportionate distribution of names

[1] In 2008, the Tennessee General Assembly enacted legislation repealing Code sections 22-1-101 through 22-4-108, addressing the selection, qualification, service, and compensation of jurors, and enacting new provisions, which became law on January 1, 2009. See 2008 Tenn. Pub. Acts ch. 1159. The revised Code is inapplicable to this appeal. Those Code sections no longer in effect will be cited as "repealed."

selected without opportunity for the intervention of any human agency to select a particular name." (repealed 2009).[2] As discussed, this method of selection has been upheld by our supreme court. We conclude that the record in this case fails to demonstrate that the venire was not randomly selected and resulted in the systematic exclusion of certain groups of potential jurors on the basis of race or age. The defendant is not entitled to relief as to this issue.

Next, the defendant argues that the former statutory provisions governing the selection of jury lists were violated. More specifically, the defendant asserts that although a county that opted to use the electronic selection method of juror lists was permitted to use lists of licensed drivers, it could not rely on this source alone but was also statutorily required to use the tax records in the selection process pursuant to Tennessee Code Annotated section 22-2-302(d). That section provided:

> (d) In any county of this state, if a majority of the circuit and criminal law judges and chancellors holding court in the county finds that the tax records and permanent registration records of the county, and records or lists of persons eighteen (18) years of age and older residing in the county who are licensed to drive, or other available and reliable sources, are so tabulated and arranged that names can be selected therefrom by mechanical or electronic means in such manner as to assure proportionate distribution of names selected without opportunity for the intervention of any human agency to select a particular name, then and in that event, such judges and chancellors may authorize the jury commission to obtain names for jury venires from such source and by such method.

(repealed 2009).[3]

In our view, the statute plainly authorized the selection of juror lists by electronic means from the "available and reliable sources" of the county, including lists of resident licensed drivers eighteen years or older, upon a finding that the manner of selection ensures the proportionate distribution of names. The defendant has cited no support for, and we disagree with, his construction of the statute to require rather than permit the examination of tax records in the selection process. Again, our supreme court has upheld the selection of jury venires based on drivers license rolls. Mann, 959 S.W.2d at 535; see also State v. Wayne Joseph Burgess, Jr., No. M1999-02040-CCA-R3-CD, 2001 WL 43216, at **3-4 (Tenn. Crim. App. Jan. 18, 2001). This issue is unavailing to the defendant.

Lastly, the defendant challenges the validity of the actions by the board of jury

---

[2]The revised Code provides in pertinent part that "[t]he jury coordinator in each county shall select names of prospective jurors . . . by random automated means . . . ." Tenn. Code Ann. § 22-2-301(a) (Supp. 2008) (emphasis added).

[3]The revised Code provides that lists of potential jurors "shall be provided from licensed driver records or lists, tax records, or other available and reliable sources that are so tabulated and arranged that names can be selected by automated means." Tenn. Code Ann. § 22-2-301(a) (Supp. 2008).

commissioners[4] as another of the "defective and illegal" methods for selecting the jury list. In particular, he contends that two jury commissioners, Mildred Adams and Henry T. Webb, were unable to discharge their duties. He asserts that Ms. Adams lacked the mental capacity to perform her duties. In support of this assertion, the defendant relies only on an affidavit of defense counsel in which counsel summarized his June 2003 telephone conversations with Ms. Adams. According to counsel's affidavit, Ms. Adams related that she had served as a commissioner for fifteen years, that she had requested to be removed from her position because she had gone through "a hard time" since the death of her husband a few years earlier, and that her memory was "bad." According to counsel, Ms. Adams was unable to answer his specific questions about the jury selection process. Regarding Mr. Webb, the defendant argues that he effectively resigned his position when he was appointed to another county office, the Board of Equalization, in April 1998, considering the statutory qualification that a jury commissioner not hold a state or county office. See Tenn. Code Ann. § 22-2-201 (repealed 2009). In support of this argument, the defendant points in the record to a 1998 Board of Equalization document purportedly signed by Mr. Webb.

Upon careful examination of the record, we conclude that the defendant has failed to establish his claim that the selection of the venire list was invalidated because two of the three McMinn County jury commissioners were disqualified to act. The record reflects that counsel filed a pre-trial motion to dismiss the indictment based on an allegedly defective jury commission. However, no hearing was held on the matter and the record is thus devoid of proof to support the defendant's claim with the exception of the aforementioned affidavit regarding Ms. Adams' "bad memory" and the 1998 document appearing to contain Mr. Webb's signature. We conclude that these documents do not establish that Ms. Adams was unfit to serve as a jury commissioner or that Mr. Webb was disqualified by his service on another county board when the venire list was prepared in 2000. In the absence of evidence that a majority of the jury commissioners were not qualified to act, "every presumption must be made in favor of their competency." Turner v. State, 111 Tenn. 593, 608 (1902). The defendant is not entitled to relief on this issue.

IV. Denial of Expert Witness on Venire Selection

The defendant challenges the denial of his request for the services of an expert in demographics and statistics. He argues that he showed a particularized need for the requested expert services to substantiate his claims of non-random juror selection. He asserts that defense counsel performed his own investigation and graphic analysis in support of his request, but that the trial court refused to permit defense counsel to be sworn and testify to the results of his work. The State responds that because the defendant failed to establish a prima facie violation of the fair cross-section requirement, he in turn failed to established a particularized need for expert services in the area of jury selection methods.

At a motion hearing, the defendant called and examined several witnesses regarding the

[4]The revised Code abolishes the board of jury commissioners and replaces their function with that of a "jury coordinator," who "shall be" the "clerk of the circuit court of the county . . . unless the judge or judges who hold circuit or criminal court in such county appoint someone other than the clerk to serve as the jury coordinator." Tenn. Code Ann. § 22-2-201(a)(1) (Supp. 2008).

process and data used in jury selection. At the conclusion of testimony of witnesses from the Tennessee Department of Safety and Local Data Processing Corporation, defense counsel sought to "argue the conclusions and . . . the content of these charts that [counsel] created, based on the data that was provided by these various people." The trial court rejected counsel's offer to be sworn and personally testify to the conclusions counsel had reached based on the charts he had generated. Further, the trial court found that based on the proof presented through the testifying witnesses, there was no showing that the jury pool was distorted by age. The trial court further found that the defendant had not made a prima facie showing that the jury selection methods for selecting either the grand jury or trial jury were flawed or that the defendant had shown any resulting prejudice from the methods used. Based on these findings, the trial court denied the defendant's request for the expert services of a statistician to "make actual proof" on the issue based on the charts and graphs counsel had generated.

A defendant is entitled to the assistance of experts at state expense only upon a showing of a particularized need. State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992). To prove "particularized need" a defendant must establish that he cannot receive a fair trial without the expert's assistance and that a reasonable likelihood exists that the expert will materially assist preparation of the defense. State v. Dellinger, 79 S.W.3d 458, 469 (Tenn. 2002). The decision to award funds for employment of an expert rests in the sound discretion of the trial court. See Tenn. Code Ann. § 40-14-207(b).

In the present case, the defendant argues that he satisfied his burden of establishing a particularized need for a statistician by showing that the juror selection method employed in McMinn County is non-random in violation of the fair cross-section requirement. As we have discussed, however, we do not conclude that the defendant established constitutional error in the juror selection process. In particular, we have concluded that the defendant failed to establish that the venire, drawn from rolls of licensed drivers, was systematically and unconstitutionally structured to exclude potential jurors on the basis of race. Indeed, both of the State's witnesses that defense counsel examined declined to testify that such a conclusion was accurate based on counsel's interpretation and analysis of the data shown to them in graph form. Because the defendant failed to show a particularized need for an expert statistician, the trial court did not abuse its discretion in denying the request.

V. Exclusion of Potential Jurors

The defendant asserts that the trial court improperly excused prospective jurors. He argues first that the trial court did not properly inquire into certain jurors' requests to be exempted from service and did not make a proper showing on the record of a valid reason for granting exemptions. Second, he argues that the trial court improperly excused jurors who did not meet the statutory requirements for exemption based on occupation or disability status. Next, the defendant complains that the trial court erred in failing to require excused jurors to register for future jury duty. Finally, the defendant contends that the trial court improperly applied the statutory exemptions for health or undue hardship. In summary, the defendant concludes that the trial court "generally erred in conducting voir dire" and did so in a manner that makes it "impossible to ascertain whether the jurors were properly excused for cause."

First, the defendant claims seven jurors were erroneously excused based only on the written requests they sent to the court: Glenda Kelly, Freddie Miller, Sharon Cannon, Lillian Smith, Christine Ashe, Robert Arnwine, and Debra Clendenen. In particular, the defendant challenges the excusal of Clendenen, Kelly, Cannon, and Miller based only on their upcoming travel plans. The defendant concludes that the trial court erred in excusing these jurors without any in-person inquiry or further showing of a valid reason that they could not serve. The defendant contends that because the jurors' letters and the formal excusals issued by the court were not included in the appellate record by the trial court clerk, he was unable to make relevant citations to the record in support of this issue. [5]

The record reflects that prospective jurors Clenenden, Kelly, Cannon and Miller each wrote to the trial judge to inform him that they had previously scheduled vacation or work-related trips. Miller, for example, notified the court, supported by a letter from his employer, that he was scheduled to be in Europe on business, while Kelly and Cannon had planned trips. Similarly, Clenenden stated that she had been on the juror selection list for over two years and planned to take a prepaid cruise vacation during the scheduled trial dates. In addition to these prospective jurors who provided written excuses, Arnwine provided a letter from his physician that indicated he was unable to serve as he had recently been released from an extended hospital stay related to his surgery for pancreatic cancer. He also appeared in person and was excused. Ashe also appeared and was excused based on the fact that she was a full-time, night-shift worker. Interestingly, the defendant also takes issue with the trial court's excusal of Lillian Smith. By letter, Smith provided three reasons that she felt she would be unable to perform jury duty. She advised the court that she was hard of hearing, that she took medication on a daily basis, and that the murder victim was a friend. More specifically, Smith wrote that "Mr. Hester murdered the brother of my good friend of over 50 years."

We have reviewed the record and find no error in the decision to excuse the challenged jurors. Pursuant to Tennessee Code Annotated section 22-5-307(a), a person summoned for jury service must appear at the specified time and place "unless excused therefrom or discharged by the judge." In the present case, the prospective jurors were either formally excused in writing or when they appeared in court based on the court's consideration of the information provided in letters to the court or responses to the court's inquiries. The excusals were certainly within the trial court's discretion. The statutory provision addressing juror qualifications and exemptions in effect at the time of the defendant's trial provided that "any person may be excused from serving as a juror . . . when, for any reason, the person's own interests, or those of the public, will, in the opinion of the court, be materially injured by the person's attendance." See Tenn. Code Ann. § 22-1-104(a) (1994) (repealed 2009). The statute further provided that "any person, when summoned to jury duty, may be excused upon a showing that such person's service will constitute an undue hardship." See id. § 22-1-104(b) (repealed 2009). Finally, as was the case at the time of the defendant's trial, the law

[5] After the completion of briefing, the box of previously retained documents consisting of juror letters, excusals by the court, and other jury selection documents, filed as Collective Exhibit #1 to the juror qualification proceeding on December 2, 2003, was transmitted to the appellate court clerk's office.

provides that the "court may discharge from service a grand or petit juror . . . for any other reasonable or proper cause, to be judged by the court." Tenn. Code Ann. § 22-1-105 (Supp. 2008).[6] The defendant has not established his claim that the trial court erred in violation of the defendant's right to trial by a fair and impartial jury by improperly excusing jurors based on the information they provided to the trial court either in writing or in person.

Next, the defendant asserts that the trial court improperly applied the statutory exemptions based on occupation or disability to excuse other prospective jurors. At the time of the defendant's trial, Tennessee Code Annotated section 22-1-103 provided a continuing exemption from jury service for professional individuals who operate their businesses as "sole proprietors." See id. § 22-1-103(d) (1994) (repealed 2009).[7] The record reflects that James Pope and Creed Bohannon were both excused because they were primarily responsible for their farming operations. Mr. Pope testified that a dairyman assisted him by milking his two hundred cows, but he was personally responsible for feeding them. Similarly, Mr. Bohannon testified that he was responsible for three hundred head of cattle with only his wife to help him. The defendant contends that these jurors and five others were erroneously excused without a sufficient showing that their particular situations justified application of the statutory occupation-based exemption provided in Tennessee Code Annotated section 22-1-103.

The record reflects that in addition to Pope and Bohannon, prospective jurors Summers, Jack, Jones, and Shelton were each excused for work-related reasons. In summary, Summers told the court that he was his company's only sales representative in the area, was paid on commission, and made about eighteen sales calls per day, and Jack was the only employee in the dental laboratory where he worked. Jones was excused based on having recently obtained a job that required him to work out of town five days per week, and Shelton was self-employed as a backhoe operator and had work scheduled. We disagree with the defendant's assertion that the trial court improperly classified these persons as "sole proprietors" and excused them on this basis pursuant to the former section 22-1-103(d). Although the trial court could have made more detailed findings, it is clear to this court from a reading of the entire voir dire transcript that the trial court dismissed these jurors upon finding that jury service would constitute a personal hardship in view of their respective employment situations. Again, such determinations were well within the trial court's discretion pursuant to section 22-1-104.

The defendant also takes issue with seven jurors' being excused for medical conditions including anxiety, depression, behavioral health issues, bipolar disorder, and memory problems. In addition, he challenges the excusal of three community college students who advised the court that jury duty could conflict with their ability to attend classes, take examinations, or keep up with their

---

[6] At the time of the defendant's trial, this statute was codified at section 22-1-106

[7] This exemption no longer exists in the revised Code, which does provide for a limited exemption for "undue or extreme" financial hardship. See generally Tenn. Code Ann. § 22-1-103(b) (Supp. 2008). Such a hardship is limited to those cases where the prospective juror would "[i]ncur costs that would have a substantial adverse impact on the payment of the juror's necessary daily living expenses or on those for whom the juror provides the principle means of support." Id. § 22-1-103(b)(5)(B).

assignments. However, in our view the trial court's excusing these prospective jurors was consistent with the exemptions from jury service outlined in the former sections 22-1-104(a) and (b).

Next, the defendant contends that the trial court similarly erred in applying the statutory disability exemption without requiring a specific showing that jurors' age and disability status prevented them from serving on a jury. At the time of the defendant's trial, section 22-1-103 provided an exemption from jury service to "[a]ll persons over sixty-five (65) years of age, disabled by bodily infirmity or specially exempted by any other positive law. . . ." See id. § 22-1-103(a)(5) (repealed 2009).[8] The record reflects that juror Virginia Simpson was excused based upon recent cataract surgery, while three other jurors, Beth Haney, Betty Hold, and Ima Burnes, informed the court that they were over sixty-five years old. Ms. Burnes, as the defendant correctly point out, stated that she was seventy-nine years old and had no transportation, and the trial court declined her suggestion that she could walk to the court each day. We conclude that there was no error in excusing these jurors pursuant to the former section 22-1-103.

Finally, the defendant contends that the trial court erred in failing to require excused jurors to register for future jury duty and "generally erred" in conducting voir dire by the manner in which it questioned certain jurors and failed to question others. As to the former contention, the former section 22-1-103 provided that persons exempted under that section were to notify the court clerk "of a seven-day period such person will be available to serve as a juror within the next twelve-month period from the date of the summons." See id. § 22-1-103(c) (repealed 2009). Our examination of the record reveals no proof with regard to compliance with this provision. Lastly, the defendant in challenging the voir dire process in general points specifically to Sandy Womac and Bobbie Clayton, both of whom were excused because they had previously planned cruise vacations. As with the jurors who were excused by letter for a similar reason, we conclude that the trial court was within its discretion in concluding that these jurors should be excused. See generally id. § 22-1-104.

The defendant has failed to establish an abuse of discretion in the excusal of potential jurors. He is not entitled to relief as to this issue.

VI. Denial of Right to Self-Representation

The defendant contends that he repeatedly requested permission to represent himself beginning with a certified letter he sent to the trial court in November 2004, nearly four months before his March 2005 trial was set to begin. He asserts that this formal written request was followed by clear and unequivocal assertions of his right to self-representation during two ensuing hearings on the matter in January 2005 and February 2005. The defendant states that after a lengthy inquiry by the trial court at the second hearing, he executed a knowing and understanding written

[8] The exemption for persons sixty-five years of age or older no longer exists in the revised Code. The revised Code does permit the excusal of a prospective juror for "undue or extreme" physical hardship, which must be documented by a licensed physician. See generally Tenn. Code Ann § 22-1-103(b)(4), (b)(5)(A) (Supp. 2008); see also id. § 22-1-103(a) ("Any person may be excused from serving as a juror if the prospective juror has a mental or physical condition that causes that person to be incapable of performing jury service," provided a licensed physician verifies such infirmity.)

waiver of his right to counsel that the trial court refused to accept. The defendant avers that the trial court improperly relied on its finding that the defendant lacked the mental competence or ability to conduct his own trial to deny him his fundamental right to represent himself. The State responds that the ruling was an exercise of the trial court's discretion and that the defendant has not demonstrated an abuse of such discretion.

Briefly summarizing the relevant background facts, upon the filing of the State's notice of its intent to seek the death penalty, Mr. Rich Heinsman was appointed as lead counsel and Public Defender Bill Donaldson as co-counsel. Both attorneys were later removed; Mr. Heinsman's March 2002 removal by the trial court resulted from the State's motion to have him removed. Following an interlocutory appeal, this court reinstated Mr. Heinsman as lead counsel in June 2002; the trial court appointed Ms. Kim Parton co-counsel. In August 2004, citing delays in the proceedings, the trial court again removed Mr. Heinsman as counsel, replacing him with Ms. Parton as appointed lead counsel. Mr. Heinsman was designated as co-counsel. The record reflects that against this background, the defendant first asserted a desire to represent himself in October/November 2004.[9] In a letter to the trial court, the defendant complained regarding Mr. Heinsman's reinstatement as co-counsel. The defendant stated, "So if Mr. Rich Heinsman is not put back on my case as leed (sic) attorney I want to fire Ms. Kim Parton. And represent myself." Similarly, in an October 27, 2004 letter, the defendant states that he has learned that "Mr. Heinsman is back as cole council (sic)." The defendant advised the trial court that having Mr. Heinsman serve as second chair was not acceptable to him and requested a hearing "to put Mr. Heinsman back as leed (sic) attorney or fire both and represent myself."

The trial court initially heard the matter on January 6, 2005. Asked the basis of his motion to proceed pro se, the defendant told the trial court that he did not feel that counsel had been doing their job, that they were focused on trying to avoid the death penalty instead of trying to "work the case" and defend him. He further complained that counsel were not providing him with copies of the documents to place in his own case file.

In response to the court's questions, the defendant testified that he was born in 1961 and had worked as a plumber the past twenty-five years. He stated he was already living on his own when he was expelled from school in the eighth grade. As to his physical health, the defendant stated that he had trouble speaking and was diagnosed with a type of cerebral palsy while housed in the custody of the DeBerry Special Needs Facility. The defendant said he was an alcoholic and had been sober for the first time in the five years he had been incarcerated. The defendant said he sniffed glue as a teenager and was admitted to Moccasin Bend for treatment. He said he underwent a psychological evaluation at Vanderbilt to determine his competency to stand trial. On reviewing the evaluation report, the court stated that one of the findings was essentially that the defendant lacked self-control when he was angry. The court declined to permit self-representation but revisited the matter on February 10, 2005.

[9] The record contains two letters from the defendant to Judge Wallace, one of which is undated and the other which reflects that it was written on "10/27/04" and apparently sent via certified mail on November 18, 2004.

At the second hearing, defense counsel informed the court of the defendant's continuing request to represent himself and of his instructions to counsel to prepare an interlocutory appeal of the trial court's ruling if he was not permitted to represent himself. On further questioning by the trial court, the defendant testified that he was uneducated in the law, had not represented himself in any criminal case, and had never watched a trial. Regarding voir dire, the defendant said he would ask jurors if they believed in capital punishment and could impose the death penalty. He said he had thought about witnesses he would call but had a "very small" idea of how to defend himself in the guilt/innocence phase. He questioned the court whether it intended to try him the following month, thus forcing him to review "16,000 pages of something . . . in less than 30 days and try to defend himself?" The following exchange took place:

> THE COURT: Do you understand that you have a right to be represented by counsel, by Ms. Parton and Mr. Heinsman?
> DEFENDANT: I'll not be represented by Ms. Parton. I'll represent myself.
> THE COURT: And it's your desire to give up the assistance of counsel and proceed without counsel and represent yourself. That's what you want to do.
> DEFENDANT: Unless I can get private counsel.
> THE COURT: Sir?
> DEFENDANT: Unless I can get private counsel between now and then.

The defendant repeated that he would represent himself unless he could "come up with a private attorney" while also stating that he had no means to hire an attorney. The defendant explained that his desire for a "private lawyer" rather than Attorney Parton was based on his opinion that it was strange that "the State's paying somebody to represent me when the State's the one that's trying to kill me." The trial court opined that the real basis for the defendant's request to proceed pro se was that he was upset that Mr. Heinsman had been designated as co-counsel rather than lead counsel. Stating that it would not permit the defendant's attempt to frustrate the process in an effort to get his way and concluding that the defendant had shown that he was incapable of representing himself, the court again denied the motion to proceed pro se.

Our supreme court has noted:

> The right to assistance of counsel in the preparation and presentation of a defense to a criminal charge is grounded in both the Tennessee and United States Constitutions. Article I, Section 9, Constitution of Tennessee; Sixth Amendment to the Constitution of the United States. It is settled law that there exists the alternative right -- the right to self representation -- which also has its foundation based on the Sixth Amendment."

State v. Northington, 667 S.W.2d 57, 60 (Tenn. 1984) (citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975)). The right to self-representation, however, is not absolute. To invoke the right, the defendant must: (1) timely assert the right to proceed pro se; (2) clearly and unequivocally request the right; and (3) knowingly and intelligently waive his or her right to assistance of counsel. State v. Herrod, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988). In addition, Tennessee Rule of Criminal Procedure 44(a) provides that indigent defendants should execute a written waiver before

being allowed to proceed pro se.

Upon close examination of the record, it appears that the defendant timely asserted his right of self-representation. We cannot agree, however, with the defendant's assertion that he clearly and unequivocally asserted his right to proceed pro se. At the February 10, 2005 hearing, the defendant repeatedly advised the trial court that he would represent himself unless he was able to retain the services of a "private attorney." At the same time, the defendant informed the court that he did not wish to proceed with Ms. Parton as one of his two appointed attorneys, but he was financially unable to retain a different attorney. In our view, the defendant's colloquy with the trial court demonstrates that his request to proceed pro se was neither clear nor unequivocal. Further, the defendant went to trial less than one month later represented by lead counsel Mr. Heinsman and co-counsel Mr. Lee Davis. The record does not reflect that the defendant objected to counsels' representation or reasserted his request to proceed pro se after Ms. Parton was permitted to withdraw.

The defendant insists that the trial court erroneously denied his attempted waiver of his right to counsel based on its conclusion that he lacked the knowledge and understanding of the law and courtroom procedures to do so in an effective manner. In our view, the trial court's inquiry into the defendant's education, physical and mental history, and background was relevant to determining whether the defendant was competent to waive his right to counsel. In view of our conclusion that the request to proceed pro se was not unequivocal, however, we do not reach the final prong of the test and do not determine whether the waiver of the right to counsel was knowing and voluntary. The defendant is not entitled to relief on this issue.

VII. Denial of Continuance

On February 28, 2005, then-lead counsel Kim Parton filed a motion to withdraw citing "professional considerations." Specifically, counsel asserted that her relationship with the defendant had deteriorated to the point that she avoided meeting with him alone. She said that at their last meeting on February 25, just before the scheduled trial, the defendant cursed her, made death threats against her family, and otherwise tried to intimidate her. At the conclusion of an ex parte hearing on February 28, 2005, the trial court twice stated that the defendant would proceed to trial "next Tuesday" with Attorney Heinsman as lead (and only) defense counsel. In response, Attorney Heinsman asserted that the ruling, coming a week before trial, "put[] a great hardship on [his] ability to prepare for trial." Counsel continued:

> I, I don't think that it has yet risen to the level where he's forfeited the right to both attorneys, and I think that from my perspective, I would certainly request the assistance of counsel who has some familiarity with this case, as well as being capital certified, and would ask for the appointment of another lawyer and the ability to prepare.

Interpreting counsel's request as a motion to continue the trial, the court denied the motion. In relevant part, the court stated:

> And you've had, what, three years on this case, $150,000.00 plus attorney

> fees? You've got to be ready for trial next Tuesday, nine o'clock. Now I, I'll give you an opportunity to recruit someone to assist you and I'll, I'll approve it. But otherwise, you and Mr. Hester, you all kind of see things together anyway, according to your pleadings, so let's - - we'll be ready to go at nine o'clock Tuesday morning. Let's get the D.A. back in here.

In its written order that followed, the trial court reiterated that "[a]lthough the defendant has waived his legal right to two attorneys, this court advised Attorney Heinsman that if he found another attorney willing to assist him with the current trial date, the court would approve funding for such assistance but that a continuance would not be granted on this basis." According to the defendant, Attorney Lee Davis "agreed to help." The record reflects that on March 2, 2005, the trial court entered an order Nunc pro tunc to February 28, 2005, appointing Davis as co-counsel. The case went to trial as scheduled.

"A motion for a continuance is addressed to the sound discretion of the trial judge and his ruling on the motion will not be disturbed in the absence of an abuse of discretion to the prejudice of the defendant." State v. Hines, 919 S.W.3d 573, 579 (Tenn. 1995) (citing State v. Strouth, 620 S.W.2d 467, 472 (Tenn. 1981)). An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied the defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted. Id.

Although imprecisely asserted, Attorney Heinsman's oral request for "the appointment of another lawyer and the ability to prepare" was a request to continue the rapidly approaching trial date. The effect of the trial court's ruling was that the defendant was represented by only one attorney, Mr. Heinsman, for approximately two days in the week before trial until Mr. Davis entered the case. As the trial court noted, Mr. Heinsman had represented the defendant at that point for more than three years since his appointment in January 2002. The defendant makes no assertion that Mr. Davis was unprepared or unable to properly fulfill his responsibilities as the defendant's co-counsel at trial. In his brief, the defendant asserts that Mr. Davis stepped in and "did a great job" despite the short time he was given.

We are mindful that an indigent capital defendant in this state is guaranteed the assistance of two qualified attorneys to represent him at trial. See Tenn. Sup. Ct. R. 13. We conclude, however, that the defendant has offered nothing in support of his bald assertion that "[r]emoving counsel at this late date dealt a serious blow to the defendant's rights and the ethical obligations of remaining counsel." As noted, the defendant went to trial as scheduled with the attorney who had represented him for more than three years assisted by qualified co-counsel. On the record presented, we conclude that the trial court did not abuse its discretion in refusing Mr. Heinsman's requested continuance. The defendant is not entitled to relief on this issue.

VIII. Sufficiency of the Evidence

The defendant argues that the State's proof fails to establish the essential elements of premeditated first degree murder. Specifically, the defendant contends that the evidence showed that his intoxication and disturbed mental state left him unable to form the required intent to kill. The

defendant submits that "all of the State's eyewitnesses who observed Defendant prior to the fire unequivocally testified that Defendant was clearly intoxicated." The defendant concludes that the evidence is insufficient as a matter of law to sustain the conviction for premeditated first degree murder.

A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt. On appeal, the defendant has the burden of illustrating why the evidence is not sufficient to support the jury's verdict. State v. Cole, 155 S.W.3d 885, 897 (Tenn. 2005); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). We are required to afford the State the strongest legitimate view of the evidence in the record, as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). We may deem evidence sufficient when it allows any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979); Bland, 958 S.W.2d at 659.

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this court. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our supreme court stated: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the state."

First degree murder is the premeditated and intentional killing of another. See Tenn. Code Ann. Sec. 39-13-202(a)(1). A premeditated killing is one "done after the exercise of reflection and judgment." Id. § 39-13-202(d). "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. Id. Premeditation requires a previously formed design or intent to kill. See State v. West, 844 S.W.2d 144, 147 (Tenn. 1992) (citing McGill v. State, 4 Tenn. Crim. App. 710, 720, 475 S.W.2d 223, 227 (1971)). It is the process "of thinking about a proposed killing before engaging in the homicidal conduct." State v. Brown, 836 S.W.2d 530, 541. "No specific period of time need elapse between the defendant's formulation of the design to kill and the execution of that plan . . . ." Id. at 543. Factors from which a jury may infer premeditation include the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, a declaration by the defendant of his intent to kill, and the making of preparations before the killing for the purpose of concealing the crime. Bland, 958 S.W.2d at 660. An established motive for the murder is another factor from which the jury may infer premeditation. State v. Leach, 148 S.W.3d 42, 54 (Tenn. 2004); State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998).

Considering the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, the State's proof showed that the defendant was drinking beer in the early afternoon of December 14. Throughout the afternoon and early evening, he tried without success to obtain more beer or money to buy more beer. Riding home with Tim Lynn in the early afternoon,

the defendant commented, referring to their wives, that the men "should kill them, you know, get rid of them so we don't have to hear their bitching no more." When Ms. Hester refused to lend the defendant beer money and encouraged the defendant to lie down and stop drinking, he became "agitated" and left the trailer. The defendant returned and began banging on the doors until he gained entry.

Brandishing a small knife, the defendant ordered Ms. Hester and Mr. Haney to the front of the trailer and threatened to slit Mr. Haney's throat. When Ms. Hester tried to break away and call for help, the defendant grabbed her, pushed her down and put the knife to her throat. The defendant retrieved duct tape from the kitchen, ordered Mr. Haney to lie on his stomach, taped Mr. Haney's hands, ankles, and mouth, and instructed Mr. Haney to turn back over. The defendant bound Ms. Hester the same way, continuously announcing that all three of them were going to die that night. The defendant sat down at a dining table for about five minutes, smoked a cigarette and continued mumbling. He then went outside and returned with a jug of kerosene that he poured throughout the trailer, splashing some on the victims. He unplugged each fire alarm and released Ms. Hester's dog. The defendant attempted to light a fire, first with matches, then with a cigarette. When this did not work, he twisted a newspaper, ignited it, placed it next to the stove, and left.

This court concludes that there was overwhelming proof to support the jury's finding of premeditated first degree murder. The defendant places great emphasis on the testimony of Ms. Hester and Tim Lynn that the defendant had been drinking and was, in their opinions, intoxicated. The jury heard this testimony and further heard the testimony of Agent Brakebill, thoroughly challenged on cross-examination, that despite the estimation of these witnesses that the defendant was drunk, his blood sample taken in the hours after the fire revealed a negative result for alcohol. The defendant's challenge to the sufficiency of the evidence fails, and he is not entitled to relief on this issue.

IX. Improper Comment on the Evidence

The defendant complains that the trial judge made inappropriate comments about certain evidence in the presence of the jury that evinced an unquestionable bias against the defendant. He contends that the trial court's comments deprived him of a fair trial and necessitate a reversal of his convictions and the grant of a new trial.

The basis of the defendant's argument surrounds the introduction into evidence of the clothing and personal items obtained from the defendant the night of his arrest on December 14, 1999. Agent Brakebill testified that the evidence was sealed inside new paint cans where it remained until the cans were opened during the defendant's trial some six years later. After the items were filed as a collective exhibit to the record, the following exchange occurred:

> THE COURT: Let's move them into evidence and put them back in the box. They're
> . . .
> GENERAL YOUNG: Okay.
> A [Agent Brakebill]: Yeah. They're stinking pretty bad.
> THE COURT: They're kind of choking me up. I don't know whether I'll – I think

members of the jury too.
A [Agent Brakebill]: They've still got kerosene on them.
GENERAL YOUNG: Your Honor, we'll, we'll make it a collective exhibit number 11.
GENERAL YOUNG: Agent Brakebill, would you mind putting them back in the cans?
THE COURT: I can smell the kerosene. It's just . . . (brief pause) . . . we'll just put it all in the box. (Brief pause) Members of the jury, I'm putting these up pretty, I'm putting these up pretty quickly. If you want to see them later, now you'll have a chance to do it.

. . . .

THE COURT: They were closer to you all than there (sic) were to me and I was, I was getting choked up a little bit.

The defendant contends that the trial court's comments in the context of a trial in which he was charged with capital murder in the course of an aggravated arson were clearly biased against him and favorable to the State. The defendant concludes that the comments mandate a reversal of his conviction because they affected the way that the jury received the evidence and in turn, its verdict. The State responds that the defendant failed to make a contemporaneous objection to the trial court's comments and has therefore waived this issue. The State further submits that the defendant has failed to show any resulting prejudice and that it would be difficult to do so considering that his defense to the crimes was not that he did not commit them, but that he was intoxicated at the time. Lastly, the State contends that the trial judge's remarks were simply an effort to spare the jurors and others in the courtroom from the kerosene fumes.

In Tennessee, judges are constitutionally prohibited from commenting upon the credibility of witnesses or the evidence in a case. See Tenn. Const. art. VI, § 9 (providing that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law"). "In all cases the trial judge must be very careful not to give the jury any impression as to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." State v. Suttles, 767 S.W.2d 403, 407 (Tenn. 1989). Our supreme court has held, however, that "not every comment on the evidence made by a judge is grounds for a new trial." Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 134 (Tenn. 2004). The trial court's comments must be considered in the overall context of the case to determine whether they were prejudicial. Id. (citing State v. Caughron, 855 S.W.2d 526, 536-37 (Tenn. 1993)).

Initially, we note that the defendant offered no objection to the trial court's comments nor did he seek a curative instruction. See Tenn. R. App. P. 36; State v. Griffis, 964 S.W.2d 577, 599 (Tenn. Crim. App. 1997) ("If a party fails to request a curative instruction, or, if dissatisfied with the instruction given . . . does not request a more complete instruction, the party effectively waives the issue for appellate purposes."). In any event, we have painstakingly reviewed the record. In our view, the trial court's comments were simply an attempt to explain to the jury the reason it directed that the exhibits in question be moved immediately from the area; that is, the exhibits were

apparently emitting a strong, unpleasant kerosene odor. Accordingly, we conclude that the trial court's explanatory remarks cannot reasonably be construed as a comment on the weight or credibility of the evidence.

X. Trial Court's Permitting State to Recall Agent Brakebill to Testify Regarding Defendant's Blood Test

The defendant argues that he was ambushed at trial when the State recalled TBI Agent Barry Brakebill, who testified, contrary to his earlier testimony and contrary to information provided to the defense in discovery, that the defendant's blood sample that showed a negative result for the presence of alcohol was drawn approximately four to five hours, not sixteen to seventeen hours, after the time of the crimes. The defendant asserts that the State's conduct was egregious and should not have been permitted because it deprived him of his only defense, intoxication, and gave him no opportunity to impeach the witness's testimony.

In his direct testimony, Agent Brakebill did not mention the defendant's blood sample. On cross-examination, defense counsel asked Agent Brakebill whether he drew or witnessed blood being drawn from the defendant at the hospital and whether the sample was still in existence. Agent Brakebill answered "yes" to both questions. On redirect examination, Agent Brakebill testified that he submitted the defendant's blood sample to the state fire marshal's office. The agent testified that he never saw the test results, but he learned from other sources that they were "negative." Defense counsel further questioned Agent Brakebill regarding counsel's understanding that "there were apparently two blood samples drawn then" and that "the blood sample that was negative for alcohol was taken almost a day after he was arrested," to which Agent Brakebill answered, "I'm not sure. I, I would need to, to see the, the lab report."

After Agent Brakebill concluded his initial testimony, the State called TBI Agent William Barker, who testified that testified that he received the defendant's blood sample from Agent Brakebill and transported it to the laboratory for analysis. After Agent Barker's testimony concluded, the State recalled Agent Brakebill and questioned him about the alcohol toxicology request form the State provided in discovery. Agent Brakebill testified that he was present at the hospital and personally witnessed the defendant's blood being drawn. He said that the blood sample was drawn late on the night of December 14 or the early morning hours of December 15, but definitely during the hours after the fire after the defendant was taken into custody and transported to the hospital for examination and treatment. On further cross-examination, Agent Brakebill testified that a nurse filled out the part of the form indicating that the blood sample was collected on "December 15th, 1999, at 12:45 pm." Agent Brakebill said that his testimony that the defendant's blood sample was actually drawn earlier was based on his personal presence when the blood was drawn.

The defendant admits that the State provided him in discovery with the certified toxicology request form that reflected that the defendant's blood sample was drawn at 12:45 p.m. on December 15. The crux of his argument is that he was never provided with any contradictory evidence of the defendant's lack of intoxication around the time of the offense or notified of the State's intent to claim at trial that the time written as listed on the form provided was incorrect. The defendant

explains that the form provided to him did not impeach his claim of intoxication because it only showed a negative alcohol result sixteen or seventeen hours after the crimes. He says that Agent Brakebill's surprise testimony that the defendant's blood showed no presence of alcohol only four to five hours after the crimes "gutted" his entire defense. The defendant adds that the defense was not provided with notice of the "critical testimony change" despite issuing several subpoenas for Agent Brakebill before trial.

The State responds that the defendant failed to offer any contemporaneous objection to Agent Brakebill's testimony and did not seek a curative instruction or otherwise take action in response to the testimony that he now challenges. The State argues that the defendant has waived this issue. See Tenn. R. App. P. 36(a). The State further asserts that the record does not evidence any attempt by the State to ambush the defendant at trial with Agent Brakebill's testimony.

In support of his claim that the trial court erred in permitting the State to recall Agent Brakebill and elicit the challenged testimony, the defendant cites only State v. Cadle, 634 S.W.2d 623 (Tenn. Crim. App. 1982). In that case, the trial court held that the State failed to comply with the defendant's request for pre-trial discovery by failing to provide the defendant with a tape-recording of a purported drug sale by an undercover narcotics agent to the defendant until after jury selection was completed. The trial court concluded that for its violation of Tennessee Rule of Criminal Procedure 16 governing requests for discovery, the State would be permitted to use the tape only for impeachment purposes. On appeal, this court reversed and remanded for a new trial upon concluding that inadequate sanctions were imposed for the State's discovery violation. Id. at 626. The court observed that the defendant was prevented from meeting or rebutting critical evidence presented against him at the last minute and was entitled to a timely sought continuance and an opportunity to refute the evidence through a proper rebuttal witness. Id. at 625.

We disagree with the defendant's attempt to frame the issue presented as a discovery violation by the State and conclude that Cadle has no application to the instant case. Although the defendant emphasizes that he issued multiple subpoenas duces tecum that generally sought all records in Agent Brakebill's possession related to the defendant's case, the defendant does not assert any specific discoverable material that the State failed to provide in response. He asserts only that Agent Brakebill's testimony was unexpected and devastating to his defense and therefore should not have been permitted. Permitting a witness to be recalled is a decision resting in the sound discretion of the trial judge. Lillard v. State, 528 S.W.2d 207, 212 (Tenn. Crim. App. 1975). The record does not reflect that the defendant sought a continuance to respond to Agent Brakebill's testimony. In summary, the record does not reflect a discovery violation by the State or error by the trial court in permitting the State to recall the witness for further examination surrounding the accuracy of a document that was properly provided in discovery. The defendant is entitled to no relief on this issue.

XI. Jury Instructions Regarding "Reasonable Doubt"

At sentencing, the jury was instructed regarding "reasonable doubt" as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof

> in the case, and an inability after such investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge. The State must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubt are doubts based purely upon speculation, not reasonable doubt. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence. Proof beyond a reasonable doubt means proof that is so convincing that you would not hesitate to rely and act on it making the most important decisions in your own lives.

The defendant submits that the instruction is constitutionally impermissible because it excludes any possible doubt of guilt, thereby suggesting an improperly high degree of doubt required for an acquittal. He concedes that both the Tennessee Supreme Court and the Sixth Circuit Court of Appeals have considered and rejected challenges to various formulations of Tennessee's reasonable doubt instruction, but he suggests that these past decisions did not focus on the precise language he challenges here and are otherwise distinguishable.

The defendant acknowledges that our supreme court has upheld a similar instruction providing that "[r]easonable doubt does not mean the capricious, possible, or imaginary doubt." State v. Hall, 976 S.W.2d 121, 159 (Tenn. 1998) (emphasis added). The defendant suggests that the use of such additional adjectives as "capricious" and "imaginary" present in the instruction in Hall avoided the "wholesale exclusion of doubt arising from possibility" that he asserts resulted from the challenged instruction used in the present case. We disagree. In our view, the instruction given in the defendant's case similarly excluded only possible doubt of a "captious" or "imaginary" nature while emphasizing that proof beyond all possible doubt was not required. Moreover, this court has upheld an instruction on reasonable doubt nearly identical to the instruction given here but without language equating proof beyond a reasonable doubt with a "moral certainty" of the defendant's guilt that has been criticized by the United States Supreme Court. See State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994) (citing Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) (holding unconstitutional an instruction equating reasonable doubt with "grave uncertainty" or "actual substantial doubt")). See also Pettyjohn v. State, 885 S.W.2d 364, 365-66 (Tenn. Crim. App. 1994). We conclude that the challenged instruction was constitutionally permissible. The defendant is not entitled to relief on this issue.

XII. Trial Court's Denial of Mitigating Evidence During Capital Sentencing Phase

The defendant asserts that the trial court erred when, during the sentencing phase of the trial, it denied the defendant the opportunity to present "important, persuasive mitigating testimony" from three different witnesses. We address the defendant's allegations of error in turn, mindful of our supreme court's observation that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." State v. Keen, 926 S.W.2d 727, 734 (Tenn. 1994). More specifically, Tennessee Code Annotated section 39-13-204(c) provides, in relevant part:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment, and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted.

At a pre-trial hearing in February 2002, Ms. Hester testified that she had visited the defendant in jail because she wanted to tell him that she had forgiven him for what he had done to her. Ms. Hester further testified, "I can forgive him, but I can't never forget." On cross-examination, defense counsel asked Ms. Hester whether she believed that the defendant should receive the death penalty. She answered, "I do not believe in the death penalty. . . . I feel like that anybody that does a crime like this should be punished for the crime, but I don't believe in the death penalty because that's not going to bring anything back. . . . Mr. Haney back, my feet back or anything."

At trial, while the jury deliberated in the guilt/innocence phase, the trial court heard from counsel regarding mitigating evidence that the defendant intended to introduce in the sentencing phase. Defense counsel advised the court that he intended to recall Ms. Hester to testify, consistent with the above-referenced pre-trial hearing testimony, that she did not want the defendant to receive the death penalty. The trial court declined to permit Ms. Hester to testify in this regard upon finding that such testimony would invade the province of the jury to determine the appropriate punishment for Mr. Haney's murder. In addition, the trial court found that the proposed testimony constituted neither a mitigating factor nor an aggravating circumstance but was "just an opinion of a mitigating circumstance." We agree with the trial court's characterization of the proposed testimony as essentially irrelevant to the jury's determination of the appropriate sentence for the murder of Mr. Haney. Although counsel in his brief asserts that he was also precluded from having Ms. Hester testify that she had forgiven the defendant, the record does not reflect that such additional proposed testimony was discussed. Moreover, the State correctly observes that the defendant failed to make a contemporaneous offer of proof regarding Ms. Hester's proposed testimony at trial. Accordingly, the defendant cannot demonstrate any prejudice resulting from the trial court's refusal to allow Ms. Hester's testimony, and he cannot prevail on this issue.

Next, the defendant complains that the trial court erroneously denied him the right to cross-examine Agent Brakebill about a sworn affidavit that Agent Brakebill took from a neighbor, Jeffrey Coleman, on the night of the fire. In his statement, Coleman reported that shortly before the fire on December 14, the defendant came to his home. Coleman further stated: "H.R. was drunk, I could not smell it, but I could tell by the way he was walking." Coleman said he turned down the defendant's request for beer and refused to lend the defendant money to buy beer, and the defendant left after about fifteen minutes. During the sentencing phase, defense counsel sought to cross-examine Agent Brakebill regarding Coleman's statement as follows:

Q [Mr. Heinsman]: All right. In his, in his statement to you, he stated that H.R. had

come to his house that same evening, the evening of the fire?
A [Agent Brakebill]: I'd like to see the statement.

The State objected to the testimony as hearsay. The trial court permitted defense counsel to continue:

Q [Mr. Heinsman]: Did Mr. Coleman make a statement to you that H.R. was drunk?
A [Agent Brakebill]: I'd like to see the statement. I, I don't want to testify –
Q: I would be happy . . .
A: – from memory. If I've written it down, the statement says what the statement says.
THE COURT: I think that would be hearsay. That - - I know what you're talking about now. That would be hearsay. I thought he said something about coming to his house.

Without conceding that the trial court erroneously excluded Agent Brakebill's testimony as hearsay, the State submits that any error in excluding the testimony was harmless.

As we have noted, evidence relevant to punishment is admissible in a capital sentencing hearing regardless of its admissibility under the rules of evidence provided that the defendant is afforded the opportunity to rebut such evidence. See Tenn. Code Ann. § 39-13-204(c). Thus, hearsay evidence is permissible to the extent that it is relevant to the circumstances of the murder, the aggravating circumstances of the murder, or the mitigating circumstances and has probative value regarding the appropriate punishment. See State v. Reid, 91 S.W.3d 247, 305 (Tenn. 2002); State v. Teague, 897 S.W.2d 248, 250 (Tenn. 1995). In this case, the defendant was attempting to elicit testimony from Agent Brakebill that a witness had described the defendant as being "drunk" just before the fire. We conclude that the trial court's exclusion of Agent Brakebill's testimony on hearsay grounds was error. Such testimony was relevant to the issue of punishment as it addressed the defendant's state of mind and responsibility for the murder. Having established error in the exclusion of this evidence, the burden shifts to the state to show that this non-structural constitutional error did not affect the sentencing verdict and was harmless beyond a reasonable doubt. State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008); State v. Thacker, 164 S.W.3d 208, 225 (2005); State v. Cauthern, 967 S.W.2d 726, 739 (Tenn. 1998). In this regard, the State correctly notes that the jury heard testimony from two other witnesses, Ms. Hester and her son-in-law, Tim Lynn, that the defendant was "clearly intoxicated" and "very drunk" just before the fire. Because the erroneously excluded evidence was cumulative to testimony that the jury heard from two other witnesses, including the surviving victim, we conclude that its exclusion was harmless.

The defendant next asserts that he was erroneously precluded from introducing notes taken by a nurse at Erlanger Hospital who treated Ms. Hester for her life-threatening burn injuries after she was transported to Erlanger on the night of the fire. According to the defendant, the nurse's patient observation notes, which he asserts comprised two pages of Ms. Hester's thousand-page medical record, included a purported statement by Ms. Hester that the defendant had tried to save her by pulling her from the fire. The defendant requested that the trial court rule on the admissibility of this portion of the medical record during a jury-out hearing when the defendant's mitigation investigator

had just concluded her testimony about unrelated records. Again, at a capital sentencing hearing, any evidence relevant to the issue of punishment is generally permissible. "While the trial court has some discretionary authority, the purpose of the statute is to permit any probative evidence of mitigation." State v. Rimmer, 250 S.W.3d 12, 18 (Tenn. 2008). Here, the trial court openly expressed its doubts about the reliability of the surviving victim's purported statement, but the court ultimately excluded the evidence as hearsay upon finding that it was not properly admitted "through this witness anyway."

Although the evidence was relevant, it was not presented through an appropriate witness. The record does not reflect that either the nurse or a proper record custodian was present to testify regarding the nurse's notes, and the defendant informed the trial court that he would not be calling Ms. Hester herself because she had already indicated she had no memory of the relevant time period. Further, the defendant made no offer of proof through any witness, and the Erlanger records were not made an exhibit to the record. As a result, the defendant cannot meet his burden of showing how he was prejudiced by the challenged ruling and is not entitled to relief on this claim.

Lastly, the defendant argues that the trial court precluded defense counsel from questioning the medical examiner regarding whether the murder involved torture. The defendant's claim is based on the following line of questioning during defense counsel's cross-examination of the medical examiner regarding the nature of the injuries to the deceased victim.

> Q [Mr. Heinsman]: Did you state to me . . . that there is nothing about this methodology that suggests any torture?
> A [Dr. Toolsie]: I - -
> GENERAL YOUNG: Your Honor, I'm going to object unless that is a new part of an . . . expert in pathology's experience and training.
> MR. HEINSMAN: Well, let me, let me back up. The State has filed . . . an aggravating factor in this case alleging torture beyond that necessary to produce death.

Following a bench conference, the following exchange occurred:

> THE COURT: Mr. Heinsman, you open the door, you've got a lot more to open. This doctor can only testify to what he found on that body. The jury could very well conclude that tying a man behind, arms behind his back, tying his mouth, and setting him on fire is in itself torture.
> MR. HEINSMAN: I understand that.
> THE COURT: So you're talking about one phase of death and the jury is thinking about another as far as - - so I want to be very clear. He's a pathologist, so . . . if he wants to testify that tying a man's hands behind his back and setting him on fire is torture, I'll let him do it.
> MR. HEINSMAN: I'll object to that testimony, so I understand Your Honor's caution.

The defendant urges that he was "precluded from questioning the medical examiner about

the lack of evidence of torture in this case" as a result of the trial court's "threat" that it would permit Dr. Toolsie to provide potentially damaging testimony if counsel persisted. Upon careful review of the record, we cannot agree with counsel's argument. In our view, the trial court did not preclude defense counsel from attempting to solicit the opinion of the medical examiner as to whether the "methodology" of the murder supported the State's allegation of torture as an aggravating factor. Instead, counsel apparently heeded the trial court's caution that continuing to question the witness as to whether the victim's death involved torture could lead to a damaging result if the witness believed that it did and so testified. The record reflects that defense counsel did not further pursue his line of questioning and that the defendant made no offer of proof regarding this matter. The defendant is not entitled to relief on this issue.

XIII. Trial Court's Admission of Victim Impact Testimony During Sentencing Phase

The defendant asserts that the trial court failed to conduct a proper inquiry into the admissibility of victim impact statements. He suggests that the "emotional and passionate" nature of the statements may have led the jury to sentence him based on such extraneous factors as "the ability of the victim's family to articulate its feelings, the jury's opinion of the victim's moral character, and sympathy for the victim[']s numerous elderly siblings . . . ."

The State introduced victim impact statements from three of Mr. Haney's siblings. Otis Haney, the victim's older brother, said that he had shared Thanksgiving dinner with the victim just before his death in 1999. He said he suffered "much stress" and health-related problems as the result of the murder. Virginia Davis, a younger sister of the victim, said that he was "a good, kind man and never harmed anyone" and that he was crippled and unable to defend himself. She said when she went to sleep every night, she saw the image of her brother being tied up and burned to death. She said justice had been postponed in this case often, and she and her family hoped it would be served so that her family "could see some peace." Betty Fain said that her brother was kind and compassionate and never physically strong. She said her whole family had been "tortured by images of our brother being burned to death, court delays, and reliving it each time there are new hearings." She said she prayed for justice "so healing can begin in our broken hearts."

Victim impact evidence should generally be limited to "information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family." Nesbit v. State, 978 S.W.2d 872, 891 (Tenn. 1998) (citing Payne v. Tennessee, 501 U.S. 808, 822, 111 S. Ct. 2597, 2607; Payne, 501 U.S. at 830, 111 S. Ct. at 2611 (O'Connor, J. concurring)). Even so, "not any and all victim impact evidence the prosecution wishes to offer at a capital sentencing hearing is admissible." Id. "Argument on relevant, though emotional, considerations is permissible, but inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely emotional response to the evidence is not permissible and should not be tolerated by the trial court." Id. at 892.

In the present case, the trial court conducted a jury-out hearing regarding the three proposed statements. Defense counsel objected to the use of the word "soon" in two of the statements, arguing

that it could be interpreted as a request for justice to be done quickly through imposition of the death penalty. The trial court sustained the objection and ordered the statements redacted accordingly. Lead defense counsel advised the trial court that the defense was satisfied with the hearing under Nesbit. The defendant did not offer any further objections at the time that the statements were read into evidence during the sentencing phase of the trial.

After reviewing the challenged statements, we conclude that each statement was properly admitted at the defendant's sentencing as permissible evidence of the emotional, psychological, and physical impact of the victim's death on a member of his family. See Nesbit, 978 S.W.2d at 888. The defendant is not entitled to relief on this issue.

XIV. Replacement of Juror During Sentencing Phase

Four alternate jurors heard the proof during the guilt/innocence phase of the defendant's trial. Before the sentencing phase began, the trial court dismissed two of the alternates and retained the remaining two. At the conclusion of the proceedings on the first day of the penalty phase, a juror reported that he was having a diverticulitis attack and was unsure whether he could continue. The trial court advised counsel that the juror, Mr. Crockett, was "not in good shape at all right now" and that his medical condition also caused him to suffer panic attacks. The court announced that it was excusing Mr. Crockett and directed that Mr. Hyde, one of the two remaining alternates, would serve on the jury while Mr. Anderson, the other alternate, would remain as the lone alternate juror.

When court convened the next morning, defense counsel requested a mistrial and a new sentencing hearing with a new jury. Counsel argued that the "simple psychology" of the situation of having a juror who had not deliberated the defendant's guilt deliberating the defendant's sentence constituted a failure of due process. The court denied the motion, noting that the alternate jurors had heard all of the proof presented to that point in the sentencing phase but had remained separated from the twelve regular jurors and had been properly instructed that the penalty phase was a separate hearing and that there was to be no discussion among the jurors about the guilt-phase deliberations. The court further observed that under defense counsel's reasoning, "you could never have an alternate [juror] in the sentencing phase of trial."

The defendant asserts that the trial court erred in replacing an original juror who had deliberated the defendant's guilt with an alternate juror before deliberations began in the sentencing phase of his trial. For this alleged violation of his right to trial by jury, the defendant concludes that he is entitled to have his death sentence vacated or, in the alternative, a new sentencing hearing. First, the State correctly observes that the defendant cites no authority "for the proposition that an alternate juror in the penalty phase of a capital trial cannot be chosen to replace an ill juror prior to the jury retiring to deliberate on the penalty." None of the cases cited by the defendant support his general position that the use of an alternate juror before deliberations have begun in the sentencing phase of a capital trial is not permitted. The defendant repeatedly points, for example, to State v. Bobo, 814 S.W.2d 353 (Tenn. 1991), a non-capital case wherein our supreme court held that the trial court committed reversible error by replacing one of the regular jurors with a previously discharged alternate after deliberations had begun. As noted, the ill juror in the defendant's case was replaced midway through the presentation of proof in the sentencing phase of the trial, well before the jury

retired to consider its sentencing verdict.

Tennessee Code Annotated Section 39-13-204(a) provides that upon a defendant's conviction of first degree murder, a "separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment." (Emphasis added.) Tennessee Rule of Criminal Procedure 24 governs the selection of jurors in criminal trials, including methods of impaneling additional or alternate jurors. The rule provides that additional jurors "shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors." See Tenn. R. Crim. P. 24(f)(1). Further, "[a]lternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict." Tenn. R. Crim. P. 24(f)(2)(B) (emphasis added). "An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict." Id. These provisions make clear that an alternate juror may replace a regular juror in the course of a criminal trial until such time as the jury retires to deliberate its verdict at which point any alternate jurors are discharged. The provisions do not, however, speak directly to the use of alternate jurors in the context of a bifurcated capital trial. Further, our research has revealed no Tennessee case addressing the use of alternate jurors during a capital trial after a determination of the defendant's guilt, but before sentencing deliberations have begun. In turning to other jurisdictions, we observe that the applicable statutory sentencing provision and rules governing the use of alternate jurors in Wyoming are substantially similar to the Tennessee provisions set forth above. The Supreme Court of Wyoming rejected a challenge to the use of an alternate juror in a capital sentencing hearing under nearly identical facts to those in the case sub judice. In Olsen v. State, 67 P.3d 536, 605 (Wyo. 2003), the court concluded that references in its rules to the discharge of alternate jurors after the jury retires to deliberate "its verdict" should not be narrowly construed as referring only to the verdict in the guilt/innocence phase of a capital trial. The court stated:

> Not only must it be read to refer to a determination of the defendant's guilt of a crime, but also to a jury's separate determination of a matter of the sort typically involved in bifurcated proceedings -- such as a defendant's habitual criminal status or the propriety of the death penalty. We agree with the State that this was precisely the intent of the statute and, pursuant to such a view, a capital case jury may be said to retire to consider its verdict twice, once for the guilt phase and once for the sentencing phase, and alternate jurors are authorized to serve in sentencing phase deliberations even if they did not serve during the guilt phase, so long as the replacement is made before the jury retires to begin sentencing phase deliberations. The legislative intent of the statutory phrase "the jury which determined defendant's guilt" includes properly substituted alternates, and we find no error in denying the motion for a mistrial.

Id. at 606.

We fully agree with the Wyoming Supreme Court's logical analysis and holding. We conclude that the trial court did not err in replacing the stricken juror with an alternate before the jury

retired to deliberate the defendant's sentence in the penalty phase of his capital trial. Lastly, we reject as sheer speculation the defendant's suggestion that the reportedly ill juror may have been seeking to "escape the emotional pressures of either having to make a decision about the death penalty at all or holding out against the majority." The defendant is not entitled to relief on this issue.

XV. Denial of Defendant's Request to Allocute During Sentencing Phase

In the sentencing phase, during a jury-out hearing on another matter, defense counsel advised the court that the defendant wished to make a statement to the jury "where he is asking them to give him the death penalty." In his handwritten statement, the defendant essentially declared that he would take responsibility for the crime "you the jury say I did." He concluded: "Now - The way I see it - and would do it myself - If I thought the defendant to be guilty, you must pass the sentence of - 'DEATH' - THANK YOU! May God be with you & your families. THANK YOU!" Co-counsel Mr. Davis stated that while the defendant's attorneys had advised him not to testify, they could not prevent him from exercising his right to do so if he insisted. Mr. Heinsman suggested that "this falls into the ground between him testifying and allocution" and suggested that the defendant had a right to allocute without cross-examination provided that he did not speak to the circumstances of the crime.

The trial court declined to permit the defendant to read his statement to the jury, finding that the defendant had not indicated that he wished to testify. The court reasoned in part that no witness would be permitted to offer their opinion about the appropriate penalty. The court concluded that if the defendant chose to testify, he would be subject to cross-examination.

The defendant submits that the trial court denied the defendant his due process rights by refusing to allow him to address his sentencing jury. He acknowledges the decision in State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994), in which the Tennessee Supreme Court stated that a capital defendant in this state has no statutory, common-law, or constitutional right to allocution, but submits that as to the latter right, the court's decision was based on its mistaken interpretation of constitutional law. As an intermediate appellate court, however, we decline the defendant's invitation to right the alleged wrong by setting aside his death sentence and remanding for resentencing to allow him the opportunity to make an unsworn statement to the jury. The defendant is not entitled to relief as to this issue.

XVII. Circumstances Surrounding Defendant's Waiver of Rights During Sentencing Hearing

In a related issue, the defendant next submits that the waiver of his right to testify was not knowing, voluntary or intelligent. He challenges the waiver by arguing that (1) the trial court erred in failing to order a competency evaluation; (2) the defendant's waiver of his constitutional rights was ineffective; and (3) the procedures in the State of Tennessee for insuring a defendant's competency and finding a waiver of rights in capital sentencing are unconstitutional. We begin by considering the defendant's right to testify against the background of the facts of his case.

In Momon v. State, 18 S.W.3d 152, 161 (Tenn. 1999), the Tennessee Supreme Court

recognized the right of a defendant to waive personally his fundamental right to testify on his own behalf. The Momon Court established a procedure for questioning the defendant regarding his decision not to testify at his trial designed to "protect the fundamental right of the accused to testify in a criminal trial and to ensure that any waiver of that right was personal, knowing, and voluntary . . . ." State v. Copeland, 226 S.W.3d 287, 304 (Tenn. 2007). To this end, the supreme court mandated that in all criminal trials, the trial court shall be required to hold a hearing outside of the jury's presence during which the defendant's counsel must voir dire the defendant to determine that the defendant's knowing, voluntary, and intelligent waiver of his right to testify is preserved on the record. At a minimum, counsel must show through his questioning of the defendant that the defendant knows and understands that (1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify; (2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying; and (3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify. Momon, 18 S.W.3d at 162. On rehearing, our supreme court held that a defendant's personal waiver of his right to testify could also be established through the defendant's execution of a written waiver. The court stated:

> We hereby hold that defendants may waive the right to testify either by signing a written waiver or by engaging in the voir dire procedure set out in the initial decision of this Court. Cf. Tenn. R. Crim. P. 23 (allowing a written waiver of trial by jury); State v. Muse, 967 S.W.2d 764, 768 (Tenn. 1998) (stating that right to be present at voir dire of the jury may be personally waived by the defendant either in writing or on-the-record in open court.") If a written waiver is executed, the written form must show at a minimum that the defendant knew and understood items 1-3 above. In addition, we agree with the State that the written waiver should not be executed before the close of the prosecution's case-in-chief.

Id. at 175.

In the present case, before the State's proof in the sentencing phase had concluded, defense counsel stated the defendant's position regarding his right to testify for the record:

> [D]uring a jury-out hearing, Mr. Hester continued in the conversation that we, the defense team has had about whether he wishes to testify or not, and he handed me a statement saying he wished to testify. Since that jury-out hearing, we have adjourned and we've had an opportunity to discuss - - Mr. Heinsman has had an opportunity to discuss the pros and cons of making such a statement to the jury. Our advice is that he not make the statement to the jury wherein he states his belief in the death penalty and essentially asks the jury to return a death penalty verdict. Despite our advice, I believe it is still his request today that, to read that allocution.

In refusing to allow the defendant's statement, the trial court commented that it would not allow anyone to give his opinion about the death penalty, but it reiterated that the defendant could

not be prevented from exercising his right to testify. The trial court proceeded to examine the defendant regarding his understanding of his right and the advice he had received from counsel. As the trial court continued its colloquy with the defendant, the defendant stated, "I'm not going to testify. I wanted to take and read my statement." Twice more, the defendant told the court that he did not want to testify, at one point stating, "I ain't got nothing to say. I just want to read my statement."

After the defense rested, the court stated that it had already "quizzed" Mr. Hester about whether he wished to testify and the defendant had indicated he did not. The record reflects that at this point, the court instructed the court's officer to hand the defendant "the Momon waiver." Later in the proceedings, Mr. Heinsman stated that he had read the defendant the waiver of his right to testify and that the defendant was willing to sign the waiver but wanted to clarify his position. Mr. Heinsman stated, "He just wants to be clear at this point that he does not wish to waive his right to make a statement. He is waiving his right to testify." The record further reflects that the defendant's waiver of his right to testify, signed personally and by his attorney, was filed in the trial court.

Turning to the defendant's particular challenges to the waiver, we conclude that the defendant has failed to address or provide any support for his claim that the trial court erred in failing to order that the defendant undergo a competency evaluation before waiving his right to testify. We glean from his very limited argument on this claim that it is the defendant's position that more than a written waiver and the inquiry undertaken by the trial court should have been required to establish a valid waiver of his right to testify. We disagree. The procedural protections required by Momon were specifically implemented to preserve a defendant's fundamental right to testify by permitting a waiver of the right only upon a showing that the waiver is knowingly, voluntary, and intelligently made by the defendant. In the present case, the record reflects a valid, written waiver personally executed by the defendant in compliance with Momon. In addition, the trial court's colloquy with the defendant leaves no doubt, in our view, that the defendant as well as his counsel otherwise indicated that he had no desire to testify on his own behalf. While we note that under Momon, it is defense counsel, rather than the trial court, that is required to examine the defendant in this regard, we conclude that the written waiver is itself sufficient to establish a valid waiver of the right to testify. Upon our careful examination of the record, this court thus concludes that there was a valid waiver of the defendant's right to testify at his trial. Further, nothing in our examination of the circumstances surrounding the waiver leads us to conclude that the defendant's decision to heed counsels' advice and give up his right to testify should have led the trial court to conclude a competency evaluation was in order.

Lastly, our supreme court has mandated the Momon procedures by which a defendant may waive his fundamental right to testify at trial. Having concluded that the defendant's written waiver was executed in compliance with Momon, and strengthened by other evidence of record, we decline the defendant's invitation to hold that the waiver in this case or the procedure permitting such a waiver in general, is constitutionally inadequate. The defendant is not entitled to relief as to this issue.

XVIII. Sentencing on Non-Capital Offenses

Relying on the decisions in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856 (2007), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the defendant argues that his sentences for aggravated arson and attempted first degree murder were unconstitutionally enhanced. He further argues that evidence offered in mitigation was not properly credited and that consecutive sentencing was improperly imposed. In response, the State concedes that the defendant's sentence was improperly enhanced, but concludes that the error was harmless.

We first address the defendant's claim that his non-capital sentences were improperly enhanced under the cited decisions. In June 2004, the United States Supreme Court held in Blakely that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, 542 U.S. at 301, 124 S. Ct. at 2536 (quoting Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63). The Court held that for Sixth Amendment purposes, the "statutory maximum" to which a trial court may sentence a defendant is that which is based only on those facts reflected in the jury verdict or admitted by the defendant. Id. at 542 U.S. at 303, 124 S. Ct. at 2537. Under Blakely, then, the maximum sentence which may be imposed is the presumptive sentence applicable to the offense. See id. The trial judge may impose a sentence that exceeds the presumptive sentence based only on the fact of a defendant's prior conviction(s) or on other enhancement factors found by the jury or admitted by the defendant.

Following Blakely, the Tennessee Supreme Court concluded in State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005) ("Gomez I") that the Tennessee Sentencing Reform Act of 1989 did not impermissibly infringe on the province of the jury in violation of a defendant's Sixth Amendment right to jury trial. Id. Thereafter, the United States Supreme Court vacated the decision in Gomez I and remanded for reconsideration in light of its decision in Cunningham. On remand, our supreme court held that a trial court's enhancement of a defendant's sentence on the basis of judicially determined facts other than the defendant's prior convictions violates the defendant's Sixth Amendment rights. State v. Gomez, 239 S.W.3d 733, 740-41 (Tenn. 2007) ("Gomez II").

At the time of the defendant's February 2006 sentencing, he did not raise a Blakely-based challenge to the trial court's imposition of enhanced sentences. This court has held that, notwithstanding Gomez I, a defendant's failure to raise the Blakely issue in the trial court constitutes a waiver of that issue and the defendant is entitled to relief only under "plain error" review. See State v. John William Matkin, III, No. E2005-02946-CCA-R3-CD, 2007 WL 4117362, at *11 (Tenn. Crim. App. Nov. 19, 2007), perm. app. denied (Tenn. Apr. 8, 2008). Tennessee Rules of Criminal Procedure 52(b) provides for plain error review as follows:

> (b) Plain Error. - When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.

See also Tenn. R. App. P. 36(b). Our supreme court has adopted the factors developed by this court to be considered when deciding whether an error constitutes "plain error" in the absence of an

objection at trial: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the [proceedings]," and "recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." Adkisson, 899 S.W.2d at 642.

In the present case, the record establishes what transpired in the trial court. The trial court applied the following enhancement factors to the defendant's sentence for attempted first degree murder:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
> (5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
> (6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great; and
> (13) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:
>
> . . . .
>
> (C) Probation

Tenn. Code Ann. § 40-35-114(1), (5), (6), (13)(C) (1999) (amended 2005). Regarding the defendant's sentence for aggravated arson, the trial court applied the following enhancement factors in addition to the ones outlined above:

> (3) The offense involved more than one (1) victim;
> (4) A victim of the offense was particularly vulnerable because of age or physical or mental disability. . . ; and
> (10) The defendant had no hesitation about committing a crime when the risk to human life was high.

Id. § 40-35-114(3), (4), (10).

A clear and unequivocal rule of law affecting the defendant's Sixth Amendment right to a trial by jury was breached when the trial court considered multiple sentencing enhancement factors other than the defendant's prior convictions. We see no indication that the defendant waived the sentencing issue for tactical reasons. Lastly, we consider whether the issue must be considered in order to do substantial justice in this case. Although the defendant has an extensive history of prior convictions including one felony theft conviction in May 1999 and thirty misdemeanor convictions, the trial court did not assign great weight to this enhancement factor. In applying the prior

convictions enhancement factor to both convictions, the trial court stated: "Those are relatively minor offenses. They have to do with, primarily with his use of alcohol. Some weight certainly has to be given those, but I do not consider, while they're appropriate, I do not put much, much weight to them because of the type of offenses they are." Given that the trial court assigned little weight to the only Blakely-compliant enhancement factor but sentenced the defendant to the maximum twenty-five years for the attempted first degree murder conviction, we conclude that consideration of this issue is necessary to do substantial justice. We thus consider the enhancement of the defendant's sentences.

Aggravated arson and attempted first degree murder are Class A felonies. See Tenn. Code Ann. §§ 39-14-302, 39-11-117 (1999). As a Range I, standard offender, the defendant was subject to a sentencing range of fifteen to twenty-five years for each conviction. See Tenn. Code Ann. §§ 40-35-105, 40-35-112(a)(1) (1999). As we have noted, the record reflects that the defendant was sentenced at his election under the law in effect prior to the 2005 amendments to the Sentencing Reform Act. The applicable law provided that the "presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors." See Tenn. Code Ann. § 40-35-210(c) (2004). Beginning at the range midpoint, then, the trial court adjusted the sentence upward or downward based on its findings regarding the presence or absence of enhancing or mitigating factors. See Tenn. Code Ann. § 40-35-210(d), (e) (2004).

Initially, we observe that the twenty-year sentence imposed upon the defendant's aggravated arson conviction was the presumptive sentence for this offense. Therefore, the defendant's claim of an improperly enhanced sentence as to this conviction is without merit. With respect to the attempted first degree murder conviction, the record reflects that the trial court relied upon three impermissible enhancement factors, assigned little weight to the remaining "criminal history" enhancement factor, and essentially found that the mitigating evidence carried little to no weight. We therefore conclude that the defendant's sentence for attempted first degree murder must be reduced to the presumptive sentence of twenty years.

We turn to the defendant's claim that evidence in mitigation was not considered or properly applied. Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. See Tenn. Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

For the purpose of meaningful appellate review, the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the

mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See Tenn. Code Ann. § 40-35-210(f); State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994). Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

With respect to evidence of mitigating circumstances, the trial court considered the defendant's "unstable and abusive family history," his history of substance abuse, some history of mental illness in the defendant's family, the defendant's lack of education, and the lack of education in his family. See Tenn. Code Ann. § 40-35-113 (13) (2003) (amended 2005). Further, the trial court considered without "much weight" that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of a mental disease or defect or intoxication, which was insufficient to establish a defense to the crime, but which substantially affected his judgment. The trial court similarly considered but assigned little weight to the defendant's "positive adjustment to incarceration, his baptism, fellowship and witness with fellow inmates, and evidence that the defendant had learned to read and write in prison." Upon consideration of all evidence of aggravating and mitigating circumstances, the trial court found that "that offense is so serious" that a consideration of all the enhancement factors "and the lack of really mitigating factors" warranted the maximum sentence for the attempted murder. The record thus belies the defendant's claim that mitigating evidence was not properly considered or applied.

The defendant also challenges the imposition of consecutive sentencing. His argument, in its entirety, is as follows: "The Trial Court further erred in ordering that all sentences in this case be served consecutively." We conclude that this issue is waived. See Tenn. Ct. Crim. App. R. 10(b) (providing that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Regardless, the defendant is not entitled to relief. The record reflects that the trial court ordered consecutive sentencing based on its finding that the defendant was on probation at the time of the conviction offenses. The decision whether to impose concurrent or consecutive sentences is addressed to the sound discretion of the trial court. See State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). One of the factors upon which the trial court may exercise its discretion to order consecutive sentencing is that the offenses for which the defendant is being sentenced were committed while on probation. See Tenn. Code Ann. § 40-35-115 (b)(6). Furthermore, our supreme court has held that a trial court's imposition of consecutive sentences does not offend a defendant's Sixth Amendment right to a jury trial. See State v. Allen, 259 S.W.3d 671, 689-90 (Tenn. 2008). The trial court did not abuse its discretion in ordering that the aggravated arson and attempted first degree murder sentences be served consecutively to each other and to the first degree murder conviction.

XIX. Trial Court's Denying the Defendant a Hearing on His "Final" Motion for New Trial

The defendant contends that the trial court erred in denying him a hearing on his "final"

motion for new trial. He asserts that his original motion for new trial was "premature and incomplete" and that the trial court unreasonably found he had waived hearing of the final motion for new trial. The defendant contends that the trial court unreasonably held defense counsel to his initial opinion that no further hearing of the later-filed motion was needed, a position that counsel later reversed. The defendant argues that he entitled to an order setting aside the denial of his motion for new trial and a hearing of his motion for new trial in all cases. The State responds that the defendant was granted a hearing on his original motion for new trial and afterwards advised the trial court that he sought no further hearing. The State submits that the trial court cannot be faulted for relying on counsel's statement and disposing of the final motion without further argument.

We summarize the procedural history of the case as follows:

Date	Proceeding/Filing
March 8-11, 2005	Defendant tried for capital and non-capital offenses
March 11, 2005	Defendant convicted of all charges
March 11-12, 2005	Capital case sentencing hearing
March 12, 2005	Defendant sentenced to death for first degree murder Judgment entered for first degree murder[10]
March 29, 2005	Pre-sentence report ordered on non-capital offenses
August 12, 2005	Motion for New Trial filed
October 17, 2005	Amended Motion for New Trial
November 3, 2005	Second Amended Motion for New Trial
November 14, 2005	Order related to Motion for New Trial; Defendant ordered to file amended motion "which concisely states with clarity the errors alleged . . . . " Motion for New Trial hearing and Sentencing Hearing for non-capital offenses set for 2/16/06.
December 1, 2005	Abridged Motion for New Trial filed
January 27, 2006	Pre-Sentence Investigation Report & Amended Report filed
February 16, 2006	Sentencing Hearing in non-capital cases Motion for New Trial Hearing
February 16, 2006	Judgments entered in non-capital cases
March 17, 2006	"Motion for New Trial - Non-Capital Charges" filed
May 22, 2006	Order Denying Motions for New Trial filed (all cases)
June 20, 2006	Defense Motion to Set Aside Order Denying Motion for New Trial and Set Rule 33 Deadline
June 20, 2006	Notice of Appeal Filed (all cases)

The transcript of the February 16 motion for new trial hearing reflects that lead defense counsel, Mr. Heinsman, declined to present oral argument on the motion.[11] Counsel stated: "Judge,

[10] A corrected judgment was entered on March 29, 2006, to reflect the correct case/docket number.

[11] The record reflects that only lead counsel, Mr. Heinsman, was present on behalf of the defense. Mr. Heinsman informed the court that co-counsel was ill, but the defense had no objection to proceeding in his absence.

the, I don't really have any argument on my motion for new trial. I've put everything I think I want to say in writing." After briefly emphasizing one issue, counsel stated that the defense would stand on its written motion. The State followed suit, and the hearing concluded with the trial court informing the parties that it would enter a written order on the motion for new trial and would "try to get that to you right away." Both the trial court and defense counsel acknowledged that, following the hearing, Mr. Heinsman approached the trial judge in chambers and an off-the-record discussion ensued. Neither the prosecutor nor the defendant himself was present. According to an affidavit submitted by defense counsel, the trial judge and the capital case attorney were present when counsel entered chambers to ask "about the timing of the second Motion for New Trial to be filed and the running of time for the Notice of Appeal." Counsel further states: "It was discussed that the Motion for New Trial would be filed and decided on the pleadings, but the defendant was not present for this conversation . . . and counsel did not and could not waive oral argument without his knowing consent." On August 28, 2006, the trial court entered an order "clarifying the record for appeal." Referencing its off-the-record discussion with defense counsel regarding a hearing of the motion for new trial in the non-capital cases, the trial court stated:

> Attorney Rich Heinsman then informed the court in chambers that he believed for the record he would need to file an additional motion for new trial related to the non-capital sentencing issues. The court asked if he would need a hearing on those matters and he said he would not. Of course, this matter was not recorded and his client was not present. The court permitted the defendant to file an additional motion for new trial to address the non-capital sentencing issues only and stated that a written order on the other matters would not be entered separately to avoid any confusion on the date for the notice of appeal. The court then informed the state of the defendant's request and that Attorney Heinsman had indicated that a hearing would not be required on the matters.

The court further stated that the motion for new trial filed in March 2006 included matters that related to the trial and a request for an additional hearing. The court stated that in early to mid-April, Mr. Heinsman spoke to the capital case attorney regarding his desire to file additional pleadings and was informed that he had until May 1, 2006, to file anything further for the court's consideration. The court states that no written order was entered setting forth this deadline, but the court was aware that it was communicated to Mr. Heinsman, and no other pleadings were filed by the May 1 deadline. The court concluded its order as follows:

> Although this court had permitted the defendant to file an amendment to the new trial motion to "make his record" by including his non-capital sentencing issues, such an amendment was not required to preserve the issues. The inclusion of issues other than the non-capital sentencing issues was outside the very lenient and extended deadline the court had set for such filings. The date for raising and arguing other matters had already passed. Accordingly, this court entered an order denying the motion for new trial without additional hearing on May 22, 2006.

As noted in the summary of proceedings above, following the sentencing hearing, judgments were entered on the non-capital offense on the same date, February 16, 2006, and the defendant filed

a motion for new trial within thirty days thereafter, on March 17, 2006. Without further hearing, the trial court denied all motions for new trial on May 22, 2006. Review of the May 22 order reflects that the trial court addressed the issues raised in the defendant's original motions relating to the capital case as well as the sentencing issues raised in the motion for new trial filed in the non-capital cases on March 17. It is the lack of an additional hearing on the latter motion for new trial that the defendant claims as error.

The defendant's argument is essentially twofold: First, he asserts that the trial court improperly deemed counsel's representation that the defense would seek no hearing on the motion for new trial related to the non-capital cases as an "absolute waiver" of his right to a hearing despite his timely reconsideration of the issue and written request for hearing of the March 17 motion; and, second, because the time for filing a motion for new trial did not begin to run until after the defendant's February 16, 2006 sentencing on the non-capital offenses, the earlier motion for new trial, the amendments thereto, and the February 16 motion for new trial hearing were all premature. The defendant concludes that he is entitled to further amend his motion for new trial, to supplement the record, and to a hearing on a final motion for new trial.

Initially, the defendant's motions for new trial and amendments thereto are timely. Pursuant to Tennessee Rule of Criminal Procedure 33(b), a motion for new trial "shall be made . . . within thirty (30) days of the date that the order of sentence is entered." In State v. Bough, 152 S.W.3d 452 (Tenn. 2004), our supreme court considered Rule 33 in a case involving a single trial for felony murder and the underlying felonies where the resulting sentences were entered on different dates. Concluding that a requirement of two separate motions for new trial arising from a single trial would serve no beneficial purpose, the court interpreted Rule 33 in such cases "to require a motion for new trial to be filed within thirty days of the day the last sentence is entered." Id. at 460-61. Applying Bough to the instant case, a motion for new trial was due within thirty days of the February 16, 2006 sentencing hearing on the non-capital offenses. Accordingly, the defendant's motions and amendments were all timely. The question becomes whether the defendant was entitled to an additional hearing on his March 17 motion, timely filed for purposes of Rule 33, but filed after the February 16 hearing on his original motion, held without objection immediately following sentencing on the non-capital offenses. We conclude that he was not.

After prematurely filing the August 2005 motion and multiple amendments thereto, counsel proceeded to the February 16 hearing on the motion without objection although it was not until that same date, following the non-capital sentencing hearing, that the thirty days permitted for filing a motion for new trial began to run. At the motion for new trial hearing on February 16, counsel announced that the defense would stand on its pleading and offered no further proof and no argument. After the hearing, counsel apparently approached the trial court about filing a motion for new trial in the non-capital cases and advised the court that the defendant would again stand on its motion, that no further hearing was required.

Rule 33(b) further provides that the trial court "shall liberally grant motions to amend the motion for new trial until the day of the hearing on the motion for a new trial." See Tenn. R. Crim. P. 33(b). As the supreme court in Bough observed, however, "this rule does not prevent a judge from allowing, at his or her discretion, an amendment to a motion for new trial at any time during

which the trial judge has jurisdiction of the case." Bough, 152 S.W.3d at 461 (citing State v. Butler, 626 S.W.2d 6, 12 (Tenn. 1981); State v. Washington, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983) (an amendment to a motion for new trial comes too late when it is filed after the trial judge has ruled upon the merits of the original motion)). In our view, the March 17 "motion" is properly construed as an additional amendment to the motion for new trial filed in August 2005. A review of the March 17 "motion" reflects that all issues presented therein allege error in the sentencing for the non-capital offenses, with the exception that the last issue challenges the sufficiency of the evidence to sustain the convictions. As noted, the trial court declined to grant the defendant a further hearing of these issues but addressed them in his May 22 order denying a new trial in all cases. We point out that Tennessee Rule of Criminal Procedure 33(c)(1) provides that the trial court "may allow testimony in open court on issues raised in the motion for new trial." Tenn. R. Crim. P. 33(c)(1) (emphasis added). Neither this provision nor any other of which we are aware requires the court to hear evidence on the motion. Based on the foregoing, we conclude that the defendant was not entitled to more and reject his claim that he was denied a hearing on his motion for new trial.

XX. Defendant's Contention that Requiring Jury to Unanimously Agree to a Life Sentence Violates *McKoy v. North Carolina* and *Mills v. Maryland*.

The defendant contends that Tennessee law unconstitutionally impinges on his due process rights and the principles of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227 (1990) and Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988) by requiring that the jury be unanimous in imposing a sentence of life imprisonment and by not informing jurors of the effect of a non-unanimous verdict. The Tennessee Supreme Court has repeatedly rejected this claim. See State v. Thomas, 158 S.W.3d 361, 407 (Tenn. 2005); State v. Reid, 91 S.W.3d 247, 313 (Tenn. 2002) (appendix). The defendant is not entitled to relief on this issue.

XXI. Defendant's Contention that Tennessee Rule of Criminal Procedure 12.3(B) Violates his Due Process Rights

The defendant essentially argues that Tennessee's capital sentencing law and Tennessee Rule of Criminal Procedure 12.3, as interpreted, violate his state and federal due process rights by failing to require that the aggravating circumstances relied upon to support a sentence of death be set forth in the indictment. The defendant relies on the holdings of the United States Supreme Court in Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546 (2006), Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) in support of his argument.

The Tennessee Supreme Court has consistently rejected the defendant's argument and held that aggravating circumstances need not be set forth in the indictment. State v. Reid, 164 S.W.3d 286, 312 (2005); Leach, 148 S.W.3d at 59; Berry, 141 S.W.3d at 562; State v. Holton, 126 S.W.3d 845, 863 (Tenn. 2004); State v. Dellinger, 79 S.W.3d 458, 467 (Tenn. 2002). In Berry, our supreme court noted that the United States Supreme Court has "expressly declined to impose the Fifth Amendment right to presentment or grand jury indictment upon the States." Berry, 141 S.W.3d at 560 (citing Ring, 536 U.S. at 597 n.4; Apprendi, 530 U.S. at 477 n.3). The petitioner is not entitled to relief on this issue.

XXII. State's Delay in Seeking Death Notice

The defendant was indicted for first degree murder in February 2000. Some eighteen months later, the prosecutor filed notice of his intent to seek a sentence of life imprisonment without the possibility of parole for this offense. Four months later, in November 2001, the prosecutor filed notice of his intent to seek the death penalty. The defendant asserts that the unlimited discretion vested in prosecutors to decide whether the death penalty will be sought in a given case opens the door to prosecutors to seek the death penalty on an "improper basis" and results in an arbitrary and capricious selection process. The defendant contends that there was no change of circumstances to support the prosecutor's eventual decision to seek the death penalty in his case, leading him to conclude that the decision was motivated solely by the prosecutor's desire to retaliate against the defendant after he refused to plead guilty and demanded a trial. The defendant argues that he is entitled to a new trial without the death penalty as a possible sentence.

The Tennessee Supreme Court has repeatedly rejected challenges to the constitutionality of the death penalty based on the prosecutor's discretion to select those defendants for which he will seek imposition of the death penalty. See, e.g., State v. Davidson, 121 S.W.3d 600, 625 (Tenn. 2003); State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995). Although the defendant questions the length of time between the indictment and the filing of the death notice and claims a vindictive motive as the prosecutor's only reason for the seeking the death penalty, he has made no showing of proof of record in this regard. Moreover, Tennessee Rule of Criminal Procedure 12.3(b)(1) provides that notice of intent to seek the death penalty must be filed not less than thirty days before trial. In this case, the notice was filed more than two years before trial. The record reflects that although the prosecutor initially filed notice of its intent to seek a life sentence in July 2001, it had noted the possibility of seeking a death sentence in status hearings as early as March 2000, pending the results of the defendant's mental evaluation results, and in later status hearings until the notice was formally filed in November 2001. The defendant offers no authority for his position that the prosecutor was not entitled to seek the death penalty after initially indicating that he would seek a life sentence. Further, although the defendant asserts that the death notice was suddenly filed, he does not claim any prejudice resulting from the timing of the notice and the record reflects none. In the trial court, defense counsel asserted that the "very visible" prejudice resulting from the delay in filing of the death notice was "that the case survived long enough for the State to file a death notice." We conclude that the defendant is not entitled to relief on this issue.

XXIII. Defendant's Assertion that the Death Penalty is Imposed in a Discriminatory Manner

The defendant generally contends that the death penalty is imposed in a discriminatory manner along racial, geographical, and gender-based lines. Our supreme court has repeatedly rejected this challenge to the constitutionality of the death penalty. See, e.g., State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Brimmer, 876 S.W.2d 75, 87, n.5 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 23 (Tenn. 1993). Further, the defendant does not attempt to establish or even argue that the death penalty was applied in a discriminatory manner is his particular case. The defendant is not entitled to relief on this issue.

XXIV. Cumulative Error

As discussed herein, this court concludes that the trial court erred in two respects; first, the trial court erroneously prohibited the defendant's attempt to elicit testimony relevant as mitigating evidence during the capital sentencing hearing on hearsay grounds. This court, however, concludes that the error was harmless as the testimony in question was cumulative to other testimony presented to the jury. Second, we have determined that the defendant's sentence for his attempted first degree murder conviction was impermissibly enhanced in violation of the defendant's right to trial by jury. We have remedied the error by vacating the erroneously imposed maximum sentence and imposing a modified, unenhanced sentence of twenty years, the presumptive sentence within the range. We conclude that there are no other errors the cumulative effect of which merit any further relief.

XXV. Standards Applied in Proportionality Review

The defendant contends that Tennessee's death penalty scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as article I, sections 8, 9, 16, and 17, article II, section 2, and article XI, section 8 of the Tennessee Constitution. First, the defendant asserts that "several" of the statutory aggravating factors set forth in Tennessee Code Annotated Section 39-13-204(i) have been so broadly interpreted that they fail to narrow meaningfully the class of death eligible defendants. Our supreme court has rejected the argument that the statute does not meaningfully limit those defendants deemed eligible for the death sentence. See State v. Cauthern, 778 S.W.2d 39, 47 (Tenn. 1989). The defendant further contends that the failure to promulgate meaningful statewide standards renders the statutory comparative proportionality review process constitutionally inadequate. "Numerous cases, however, have held that Tennessee's proportionality review is adequate to meet State constitutional standards." See State v. Vann, 973 S.W.2d 93, 118 (Tenn. 1998) (citing State v. Coleman, 619 S.W.2d 112, 115-16 (Tenn. 1981); State v. Barber, 753 S.W.2d 659, 663-668 (Tenn. 1988); State v. Keen, 926 S.W.2d 727, 743-44 (Tenn. 1994)). The defendant is not entitled to relief on this issue.

XXVI. Defendant's Assertion that Lethal Injection Constitutes Cruel and Unusual Punishment

The defendant challenges his sentence to death by lethal injection as cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution. In particular, he contends that the three-drug protocol employed to carry out lethal injections in this state creates a foreseeable risk of unnecessary pain and suffering that is contrary to "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598 (1958) (plurality opinion). The defendant acknowledges that the Tennessee Supreme Court rejected an identical challenge to the constitutionality of the lethal injection protocol in Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 309 (Tenn. 2005), cert. denied, 547 U.S. 1147; 126 S. Ct. 2288 (2006). He asserts, however, that continuing investigations by the scientific community in other states show that the use of the three-drug protocol is problematic.

Since the filing of appellate briefs in the defendant's case, the United States Supreme Court

has upheld the constitutionality of the three-drug lethal injection protocol used by the State of Kentucky and twenty-nine other jurisdictions including the State of Tennessee and the federal government to carry out executions. See Baze v. Rees, 128 S. Ct. 1520 (2008). In holding that the three-drug protocol satisfied the Eighth Amendment, the Baze Court concluded that the inmate petitioners had "not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constituted cruel and unusual punishment." Id. at 1526. Accordingly, the defendant is not entitled to relief on this issue.

XXVII. "Fundamental Right to Life" Argument

The defendant challenges his death sentence as violating his fundamental right to life and as unnecessary to promoting any compelling state interest. Our supreme court has repeatedly rejected this argument. See State v. Mann, 959 S.W.2d 503, 536 (Tenn. 1997) (Appendix); State v. Bush, 942 S.W.2d 489, 523 (Tenn. 1997); Cauthern v. State, 145 S.W.3d 571, 629 (Tenn. Crim. App. 2004) (citing Nichols v. State, 90 S.W.3d 576 (Tenn. 2002)).

XXVIII. International Law and the Supremacy Clause

The defendant contends that the imposition of the death sentences violates his rights under international law and under treaties entered into by the United States including The International Convention on the Elimination of All Forms of Racial Discrimination; The International Covenant on Civil and Political Rights, and The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The defendant submits that in violating his rights under international law and the cited treaties, the State is thereby in violation of the Supremacy Clause of the United States Constitution. See U.S. Const. art. VI, cl. 2.

In rejecting such a challenge to the constitutionality of the death penalty, our supreme court has observed: "The authorities appear to be universal that no customary or international law or international treaty prohibits a state from imposing the death penalty as a punishment for certain crimes." See State v. Odom, 137 S.W.3d 572, 599 (Tenn. 2003) (appendix) (citing numerous state and federal cases reaching similar conclusion).

XXIX. Considerations Regarding Governor's Moratorium on the Death Penalty, Arbitrariness of its Application, and other Constitutional, Statutory, and Human Rights Issues

In a related argument, the defendant suggests that his death sentence should also be overturned and his case remanded for resentencing in light of an effective moratorium on the death penalty in Tennessee during a comprehensive review of the procedures for administering the death penalty in this state as ordered by the Governor of Tennessee in February 2007. At the conclusion of its review, the Tennessee Department of Correction retained the three-drug protocol but updated its lethal injection protocol for carrying out executions. See Tenn. Dep't of Corr., Report on Administration of Death Sentence in Tennessee (Apr. 30, 2007), available at Workman v. Bredesen, 486 F.3d 896, 913-921 (6th Cir. 2007) (Appendix). As we have noted, the United States Supreme Court has recently rejected a challenge to the constitutionality of a lethal injection protocol

substantially similar to that employed in this state to carry out death sentences. We conclude that the defendant is not entitled to relief on this issue.

Lastly, the defendant urges this court to reject his death sentence based on the defendant's conclusion that struggles with the constitutionality of the lethal injection protocol in this state and others, as well as concerns about the reliability and functioning of capital sentencing schemes can only lead to the conclusion that the system is "broken." As an intermediate appellate court, we are bound to follow the law and decline the defendant's invitation to reverse the punishment imposed absent a determination that there was reversible error in the conviction or sentencing process. To this point, we have found none and conclude that the defendant is not entitled to relief on this issue.

Proportionality Review

This court is statutorily mandated to review the sentence of death to determine whether:

> (A) The sentence of death was imposed in any arbitrary fashion;
> (B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;
> (C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and
> (D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Tenn. Code Ann. § 39-13-206(c)(1); see also State v. Bland, 958 S.W.2d 651, 661-74 (Tenn. 1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1536 (1998). As our supreme court stated in Bland:

> To assist [the appellate c]ourt in fulfilling [its] statutory duty, the State and the defendant in each case must fully brief the issue by specifically identifying those similar cases relevant to the comparative proportionality inquiry. When addressing proportionality review, the briefs of the parties shall contain a section setting forth the nature and circumstances of the crimes that are claimed to be similar to that of which the defendant has been convicted, including the statutory aggravating circumstances found by the jury and the evidence of mitigating circumstances. In addition, the parties shall include in the section a discussion of the character and record of the defendants involved in the crimes, to the extent ascertainable from the [Tennessee Supreme Court] Rule 12 reports, appellate court decisions, or records of the trials and sentencing hearings in those cases.

Bland, 958 S.W.2d at 667.

In his brief, the defendant generally contends that the comparative proportionality review we undertake violates federal and state due process guarantees and is not adequate to shield defendants from the arbitrary and disproportionate imposition of the death penalty. The defendant does not identify any specific cases relevant to our review or address the sufficiency of the evidence of the aggravating circumstances found.

We begin with the presumption that the sentence of death is proportional with the crime of first degree murder. State v. Hall, 958 S.W. 2d 679, 699 (Tenn. 1997), cert. denied, 524 U.S. 941, 118 S. Ct. 2348 (1998). If a case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed," then the sentence is disproportionate. State v. Keough, 18 S.W.3d 175, 183 (Tenn. 2000) (citations omitted). In comparing this case to other cases in which the defendant was convicted of the same or a similar crime, this court considers the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved. See Terry v. State, 46 S.W.3d 147, 163-64 (Tenn. 2001), cert. denied, 534 U.S. 1023, 122 S. Ct. 553 (2001).

Factors relevant to our review include: (1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims. Bland, 958 S.W.2d at 667. Factors considered when comparing characteristics of defendants include: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of victim(s); and (8) the defendant's capacity for rehabilitation. Id.

Upon consideration of the nature of the crime and the defendant in light of these factors, we conclude that imposition of the death penalty for the torturous, premeditated killing of the helpless, elderly victim is not disproportionate to the penalty imposed in similar cases. The proof showed that on the day of the murder, the defendant had been drinking intermittently and was unsuccessful in trying to obtain money to buy more beer. That same day, the defendant learned that the victims had discussed being married as a means that would allow Mr. Haney's benefits to be left to Ms. Hester upon Mr. Haney's death. After Ms. Hester also refused to give him beer money, the defendant became upset and left the mobile home he shared with her and Mr. Haney. The defendant returned a short time later, demanded entrance, and angrily confronted both victims with a small knife. After forcing them to the living area, the defendant held the knife first to Mr. Haney's throat and threatened to kill him, then turned his attention to Ms. Hester, cutting her throat as he threatened to kill her. After binding each victim's hands, feet, and mouth, the defendant poured kerosene through the trailer, some of which splashed onto the victims. The defendant disabled the smoke detectors, released Ms. Hester's dog, and repeatedly informed the victims that they were going to die that night and that he intended to "tell the law" what he had done.

The defendant took painstaking efforts to ignite the fire. When first matches and then a cigarette did not work, he lit a twisted newspaper, set it next to the stove, and left the victims to burn to death. The seventy-seven-year-old victim suffered thermal burns over most of his body and on his face before he died from a combination of thermal burns and the inhalation of superheated smoke in his lungs. Ms. Hester survived the fire with extensive burns that resulted in the loss of her legs.

At the time of the murder, the defendant, a white male, was forty-four years old. His criminal record included one prior felony theft conviction and thirty-one misdemeanor convictions including reckless endangerment, criminal trespass, assault, resisting arrest, unlawful possession of a weapon, public intoxication, driving under the influence of an intoxicant, and disorderly conduct. The judgment reflects that the trial court ordered the defendant's sentence to run consecutively to a two-year probationary sentence he was serving at the time of the murder. The defendant has a history of abusing alcohol and other substances and suffered physical and mental abuse by his father as a child. The defendant has shown no apparent remorse for his crimes; in his brief, he asserts that he has no memory of the crimes and, despite the testimony of the surviving eyewitness victim, is unsure "what role, if any, he played in the death of Charles Haney and the severe injuries suffered by Dora Hester as the result of an apparent arson fire."

In summary, the proof showed that the defendant, acting alone, attempted to kill his ex-wife and murdered the elderly man she cared for without provocation, justification, or apparent remorse. The defendant bound and gagged his victims, who suffered mental anguish and physical pain upon hearing of the defendant's plans to kill them, having gasoline splashed on and all around them, and ultimately being left to burn alive. The proof in mitigation showed that as a child, the defendant lived in an unstable and abusive environment that he was forced to leave at a young age. In addition, witnesses testified that the defendant was a skilled worker and had demonstrated good work habits despite his long history of alcohol and other substance abuse and that he had evinced a "spiritual growth" since being incarcerated.

Upon our review, the court concludes that the defendant's sentence of death in this case was not applied arbitrarily and was not excessive or disproportionate to the penalty imposed in similar cases. The death penalty has been upheld in the following cases involving similar facts and the application of one or both of the statutory aggravating circumstances found in the instant case. State v. Rollins, 188 S.W.3d 553, 575-77 (Tenn. 2006) (defendant stabbed to death eighty-one-year-old shop owner in the course of a robbery, inflicting more than twenty non-fatal, painful stab wounds as the victim was alive, conscious and retreating; death sentence upheld based on (i)(5)-(7), and (i)(14)); Bland, 958 S.W.2d at 670-74 (defendant shot to death the helpless, retreating victim, firing several shots after the victim lay on the ground; death sentence upheld based on (i)(5)); State v. Hodges, 944 S.W.2d 346, 358-59 (Tenn. 1997) (defendant murdered randomly chosen victim to obtain money; defendant placed pillowcase over victim's head, bound his feet and hands, discussed whether to kill victim in his presence, then strangled victim to death as he pleaded for his life and remained conscious during the three to five minutes required to accomplish his killing; death sentence upheld based on (i)(2), (5), and (7)); State v. Caughron, 855 S.W. 2d 526, 544 (Tenn. 1993) (defendant tied and gagged victim, told her she would die as she begged for her life, then beat her about the head until she was likely rendered unconscious before other abuse occurred; death sentence upheld based on (i)(5)); State v. Jones, 789 S.W.2d 545, 550 (Tenn. 1990) (defendant bound, gagged and blindfolded victim and stabbed him to death during a robbery as helpless victim cried and begged not to be hurt; death sentence upheld based on (i)(2), (5), and (7)).

Having reviewed the circumstances of this case, we conclude that the death penalty imposed

is not excessive or disproportionate to the penalty imposed in similar cases.

CONCLUSION

This court has conducted the statutorily mandated comparative proportionality review and concluded that the sentenced imposed in the defendant's case is proportionate to the penalty imposed in similar cases. We have considered the entire record and conclude that the sentence of death was not imposed arbitrarily, that the evidence supports the jury's findings of the aggravating circumstances beyond a reasonable doubt, and that the evidence supports the jury's finding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. In addition, we have reviewed each of the issues raised by the defendant. We conclude that the trial court erred in enhancing the defendant's sentences for his non-capital conviction for attempted murder based in part on factors that were neither admitted by the defendant nor found by a jury. Accordingly, we reduce the sentence for the attempted first degree murder conviction to the presumptive sentence of twenty years. In all other respects, the judgments of the trial court are affirmed.

_____

D. KELLY THOMAS, JR., JUDGE